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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 337

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, NATIONAL LIFE INSURANCE COMPANY, ET AL., APPELLANTS,

vs.

FRANK C. MOORE, COMPTROLLER OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED SEPTEMBER 9, 1947.

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[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION—FIRST DEPARTMENT

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, Massachusetts Mutual Life Insurance Company, National Life Insurance Company, Penn Mutual Life Insurance Company, and Phoenix Mutual Life Insurance Company (Original Plaintiffs); and Aetna Life Insurance Company, The Prudential Life Insurance Company of America, The Union Mutual Life Insurance Company, and The Union Labor Life Insurance Company (Plaintiffs Added by Stipulation), Plaintiffs-Appellants,

against

FRANK C. MOORE, Comptroller of the State of New York, Defendant-Respondent

STATEMENT UNDER THE RULE

This action was commenced by the service of the summons and complaint on June 9, 1945. Defendant's answer was served on May 31, 1946.

The names of the original parties, and of the parties added by stipulation, are as stated in the above title.

[fol. 2] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

[Title omitted]

NOTICE OF APPEAL TO APPELLATE DIVISION

Please take notice that the plaintiffs hereby appeal to the Appellate Division, First Department, from a judgment dated October 24, 1946, and entered herein in the Office of the Clerk of the County of New York on October 25, 1946, [fol. 3] except so far as said judgment granted some of the relief prayed for in the complaint herein.

October 25, 1946.

Yours, etc., Ganson J. Baldwin, Attorney for Plaintiffs, 72 Wall Street, New York 5, New York.

To: Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for Defendant, and Clerk of the County of New York.

[fol. 4] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, Massachusetts Mutual Life Insurance Company, National Life Insurance Company, Penn Mutual Life Insurance Company, and Phoenix Mutual Life Insurance Company (Original Plaintiffs); and Aetna Life Insurance Company, The Prudential Life Insurance Company of America, The Union Mutual Life Insurance Company, and The Union Labor Life Insurance Company (Plaintiffs added by Stipulation), Plaintiffs,

against

FRANK C. MOORE, Comptroller of the State of New York, Defendant

Present: Hon. Joseph A. Gavagan, Justice.

JUDGMENT APPEALED FROM—October 24, 1946

Upon reading and filing the defendant's notice of motion dated June 14, 1946, for judgment on the pleading dismissing the complaint, and upon reading and filing the complaint and answer herein, all in support of the motion; and upon the argument of said motion counsel for the defendant having conceded that the facts stated in the complaint are substantially correct, and the plaintiffs having thereupon [fol. 5] moved in open court for judgment for the relief sought in the complaint, and the Court having granted leave to make said motion, and the defendant having consented to the making of such motion in open court; and after hearing Abe Wagman, Esq., Assistant Attorney General, in behalf of the defendant, and Ganson J. Baldwin, Esq., in behalf of plaintiffs; and upon filing the opinion of the Court; it is

Ordered, adjudged and decreed as follows:

1. Plaintiffs' motion for judgment is granted to the extent hereinafter set forth, and in other respects denied. Defendant's motion for judgment on the pleadings is denied except as hereinafter stated.

2. The provisions of the Abandoned Property Law of the State of New York pertaining to life insurance companies (Chapter 1 of the Consolidated Laws), as amended (including Chapters 498 (Sec. 2) and 497 of the Laws of 1944,

and the statute which they amend, Chapter 697 of the Laws of 1943), are unconstitutional and void in so far as they apply to policies of life insurance issued for delivery outside of the State of New York by foreign life insurance companies.

3. This decree is without prejudice to the rights of any insurance company to assert, by action or otherwise, that said Abandoned Property Law, or any rule or regulation made thereunder, is unconstitutional and void in so far as [fol. 6] it may, or may purport to, deprive it of any total or partial defenses by reason of any statute of limitation or for any other reason, to any life insurance policies, or to any liability thereunder.

4. Except as hereinabove set forth, the provisions of said Abandoned Property Law pertaining to life insurance companies, in so far as said provisions are under attack in this action, are in all respects constitutional and valid.

5. The defendant Comptroller of the State of New York, his successors and agents, and all other persons acting or attempting to act under or by virtue of said Abandoned Property Law, are hereby enjoined and restrained from enforcing or attempting to enforce any of the provisions of said Abandoned Property Law in so far as such provisions are hereby decla ed to be unconstitutional and void, and from making or enforcing or attempting to enforce any rulings or regulations inconsistent herewith.

Enter,

J. G., J. S. C.

Archibald R. Watson, Clerk.

[fol. 7] In Supreme Court of New York, County of New York

Defendant's Notice of Motion to Dismiss, Etc.

Please take notice that upon the complaint and answer herein the defendant Frank V. Moore, Comptroller of the State of New York, will make a motion at Special Term, Part III of this Court on the 28th day of June, 1946, at 10:00 o'clock in the forenoon thereof, or as soon thereafter as counsel can be heard, for an order, under Rule 112

of the Rules of Civil Pratcice, dismissing the complaint and granting judgment in favor of the defendant, with costs, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, N. Y., June 14th, 1946.

Yours, Etc., Nathaniel L. Goldstein, Attorney-General of the State of New York, Attorney for Defendant, No. 80 Centre Street, Borough of Manhattan, New York 13, N. Y.

To: Ganson J. Baldwin, Esq., Attorney for Plaintiffs, 72 Wall Street, New York 5, N. Y.

[fol. 8] In Supreme Court of New York, County of New York

Summons

To the above named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiffs' attorney within 20 days after the service of this summons, exclusive of the day of service. In case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, June 8, 1945.

Ganson J. Baldwin, Attorney for Plaintiffs, 72 Wall Street, New York 5, N. Y.

[fol. 9] In Supreme Court of New York, County of New York

Complaint

The plaintiffs, by Ganson J. Baldwin, their attorney, for their complaint herein, allege, upon information and belief, as follows:

1

The defendant, Frank C. Moore, is the Comptroller of the State of New York, and has the duty of administering

the Abandoned Property Law and statutes hereinafter referred to, and thereunder would have the custody of the funds referred to therein and involved in this suit.

2

The plaintiffs are foreign mutual life insurance corporations licensed to do and doing business in the State of New York, and in most of the other States of the United States, and duly organized and existing under the laws of the following States, and having their principal places of business, known as "Home Offices", in the following cities in said States, respectively, and are herein referred to as "the companies", the names of the plaintiffs being herein abbreviated for convenience:

Company	*State*	*Home Office*
Connecticut Mutual	Connecticut	Hartford
Massachusetts Mutual	Massachusetts	Springfield
National Life	Vermont	Montpelier
Penn Mutual	Pennsylvania	Philadelphia
Phoenix Mutual	Connecticut	Hartford

[fol. 10]

3

The companies were all chartered in their home States nearly 100 years ago, and have been authorized to do business in this State for nearly 100 years for the most part, and in no instance for less than 50 years, and have done business in these States during such period, and for a great many years have done business in most of the other States of the United States pursuant to licenses granted by such States, and are continuing to do business in such States, and have subjected themselves to the laws of said States as to policies delivered therein, and are subject to the service of process therein and to being sued therein, and have made the deposits of cash and securities required by the laws of said States for protection of policyholders in said States and to secure compliance with the laws thereof.

4

Outstanding life insurance policies, including policies on the endowment plan, issued by the plaintiffs total in number over 1,500,000 and, in face amount, over $5,000,000,000,

issued over a long period of years throughout the United States, and the percentage thereof, in number and face amounts, issued through agents of the plaintiffs located in the State of New York (although such policies may not have been delivered in the State of New York) is about 17%.

5

The business of the plaintiffs, and other life insurance [fol. 11] companies, is conducted from their Home Offices, where their officers, records, and securities are situated.

6

Applications for policies are obtained by agents throughout the United States, and are sent to the Home Offices for consideration, and, if approved, the policies are written at the Home Offices and sent to the agents for delivery to the applicants.

7

Premiums are payable at the Home Offices, or, if paid to an agent, are forwarded to the Home Offices.

8

Notices as to premiums coming due, and as to policy loans, interest on policy loans, lapses, etc., are mailed to policyholders from the Home Offices.

9

Loans on policies are considered and made at the Home Offices, and loan checks are drawn at the Home Offices and mailed to the policyholders, or to the agents for delivery to the policyholders.

10

Claims under policies must be made at the Home Offices, under the terms of the policies, which provide that upon receipt at the Home Office of "due proof" of death, or other event, the company will pay, etc., and all claims are considered at the Home Offices, and, if allowed pursuant to [fol. 12] the terms of the policies, are paid by checks drawn at the Home Offices.

11

Income of the companies consists essentially of premiums and the return on their investments, and such income of each

company is its general property in which it has the beneficial ownership, and does not consist of deposits or trust funds and is not earmarked or held under any particular policy, but is used to pay expenses and claims and to provide reserves to pay future claims which may be properly paid in accordance with the terms of the policies or other contracts of the companies.

12

Assets of the companies consist principally of securities which are held at the Home Offices, and the Home Office buildings and equipment, and funds on deposit with banks pending investment and to meet current claims and expenses, and such assets of each company are its general property in which it has the beneficial ownership, and are not deposits, or trust funds and are not earmarked or held under any particular policy, but are general assets available for the payment of current expenses and claims and to provide for the payment of prospective obligations when they may become due under the terms of the policies and other contracts of the companies.

13

Liabilities of the companies are essentially expenses and valid claims properly presented, and a contingent pro- [fol. 13] spective liability for estimated future claims, taxes and expenses, represented in the companies' accounts by items designated as "reserves".

14

Policies issued by the companies contain provisions in substance as follows:

(a)

Payment is contingent upon furnishing "due proof" of death, or disability, or accidental death, or age, or survival, etc., to the company, and some policies require the surrender of the policy to the company. Nothing is payable under a policy until "due proof" is filed, and until the policy is surrendered when the policy so provides. Claims under policies are "payable at the Home Office" of a company.

(b)

Effectiveness of a policy usually depends upon its being "delivered and the first premium paid during the lifetime and good health of the insured", a provision which is usually contained in the policies or in the applications for insurance, copies of which are attached to policies when issued and made a part thereof.

(c)

Age of an insured, if understated, as it frequently is, may greatly reduce the liability of the company, which "shall be the amount of insurance which the premium would have purchased at the correct age". This is a standard provision [fol. 14] in New York and elsewhere (N. Y. Insurance Law, Sec. 155[1] [d]). The correct amount of a policy is not known until the date of birth is established by proof submitted at the time a claim is filed. For example, if an insured gave his age as 55, when he was actually 60, a company's liability on a $1,000 policy might be less than $800.

(d)

Suicide of the insured within 2 years after the issuance of a policy is not covered, and in such cases liability is limited to the premiums paid. This is a standard provision in New York and elsewhere (N. Y. Insurance Law, Sec. 155[2] [b]). Until a claim is filed and due proof submitted the companies cannot ascertain whether death was suicidal.

(e)

Beneficiaries may be either vested or subject to change, according to the terms of the policy.

(f)

Assignments of policies may be made.

(g)

Fraud or misrepresentations in an application for a policy may invalidate the policy.

(h)

War and military service may reduce or eliminate the liability of a company.

[fol. 15] (i)

Aviation activities of an insured may reduce or eliminate the liability of a company.

15

Impersonation, fictitious insureds and other frauds are encountered by the companies in the life insurance business and render policies unenforceable.

16

In many instances the reason that no claims have been made under certain policies may have been that the insureds or beneficiaries knew that the policies were unenforceable, or did not cover, for one or more of the reasons mentioned, or due to some other illegality or breach of condition.

17

Policies issued by the companies upon the lives of persons who appeared to reside in this State frequently have been and are delivered in some other States, and the premiums paid in other States.

18

Policies issued by the companies frequently have been and are applied for and obtained in another State by an employer, creditor, partner, husband, wife, parent, or other person, for his or her own benefit, upon the life of a person who appeared to reside in this State.

[fol. 16] 19

Every year thousands of persons holding policies issued by the companies, including vested beneficiaries and assignees, have changed their residences from one State to another, and they continue to do so.

20

It has never been customary in the insurance business to inquire into the legal residence of the persons on whose lives insurance is issued, and many such persons who have given addresses in this State may have been residents of other States, and the companies have no knowledge as

to such residences, and no means of determining such residences, even as to policies currently issued, since even if evidence of residence were required it would usually be inconclusive.

21

The laws of some of said States provide, among other things, that in suits against the companies in said States the fee of a claimant's attorney will be added to the amount recoverable, and that penalties ranging as high as 25% may be added to the claim for delay in payment, and such additional sums are included in judgments rendered in the courts of such States.

22

The companies are and always have been fully able to meet all of their obligations, and they maintain fully adequate reserves therefor, as required by the laws of the [fol. 17] States in which they are incorporated and by the laws of this State, and by the laws of the other States of the United States, and such reserves have been approved by the insurance officials and authorities of such States, and the business, accounts and assets of the companies have for many years and are constantly being supervised and audited by the insurance officials and authorities of such States.

23

The Abandoned Property Law of the State of New York, as enacted by Chapter 697 of the Laws of 1943, did not apply to foreign life insurance companies. It was amended by Chapters 497 and 498 (Sec. 2) of the Laws of 1944 to include foreign life insurance companies. The text of the statute, as so amended, insofar as it relates to life insurance companies, is Exhibit A attached hereto, the words added by said amendments being italicized and the words deleted by said amendments being in brackets. The text of Chapters 498 (Sec. 2) and 497 of the Laws of 1944, insofar as they relate to life insurance companies, is in Exhibits B and C, respectively, attached hereto. For convenience, the statute, as so amended, will be referred to as the "statute" or as the "Abandoned Property Law" (which is Chapter 1 of the Consolidated Laws of New York).

24

The Abandoned Property Law also relates to various subjects not pertinent to this case, such as escheat of real property in this State (Article II); bank deposits in this State (Article III); deposits with gas, electric and other [fol. 18] utility companies in this State (Article IV); deposits in courts of this State (Article VI); condemnation awards as to property in this State (Article X); deposits in Federal Courts located in this State, subject to approval by such Federal Courts (Article XII); and miscellaneous items such as the unclaimed surplus from the sale of pledged property in this State, and unclaimed personal property of persons in State institutions of this State, and unclaimed proceeds from the sale of stolen automobiles in this State, and from the sale of wrecked property in this State, and unclaimed wages payable by employers in this State (Article XIII); there being no attempt to legislate as to matters beyond the borders of the State except in respect to life insurance.

25

The statute, as it applies to life insurance, and the interpretations placed upon it by the defendant Comptroller of the State of New York, who is charged with its administration, and is enforcing it, and his instructions to the plaintiffs and other companies, are in substance as follows:

(a)

The statute provides that domestic and foreign life insurance companies (Sec. 103d) must pay annually to the Comptroller "any moneys held or owing" under policies "issued on the lives of residents of this state" (Sec. 700), when unclaimed for 7 years (with some exceptions as stated in Sec. 700).

[fol. 19] (b)

The Comptroller claims that "if at the time of the contract an insured was a resident of the State of New York the item" (the policy) "comes within the provisions of the statute", and that "a subsequent change of residence of the insured does not remove the item from the operation of this law", and that "the words 'issued on the lives of residents of this state' refer to the residence of the insured

at the time the contract was made and not to his residence at any later date".

(c)

The Comptroller claims that the words "any moneys held or owing" under a policy mean the amount which would be payable if a proper claim were presented, although no claim has been made at all, his instructions being as follows:

> "(c) Amount due. Such amount is the amount which would be payable if a proper claim were presented establishing, as the case may be, that:
>
> "(1) the insured survived the endowment period, or
>
> "(2) the insured died on the day he reached the maximum age of the mortality table" (which age varies from about 96 to 100, according to the mortality table used), "or
>
> "(3) the identity and right to payment of a person entitled to the proceeds of a policy when the fact of the insured's death has been proven to the insurer."

[fol. 20]

(d)

The statute requires that before payment to the Comptroller each company must file with him an annual report of such policies (Sec. 701), the preparation of which involves substantial work and expense.

(e)

The statute also requires that, before payment to the Comptroller, each company must publish a notice entitled "Notice of Names of Persons Appearing as Owners of Certain Unclaimed Property Held By (name of life insurance corporation)" in two successive weeks in a newspaper (designated by the Comptroller under Sec. 1410) in the county of the last-known address of "the holder" of each such policy, unless "such last-known address is outside of the state of New York" in which case the comptroller may designate any newspaper published in New York (Sec. 702). The notice must contain various details including "the names and last known addresses * * * of all persons appearing to be entitled to any abandoned property

amounting to ten dollars or more" (Sec. 702(3) (a)), and including a statement by the company "that such unclaimed moneys will be paid by it on or before" August 31st "to persons establishing to its satisfaction their right to receive the same" (Sec. 702(3) (c) (ii)), and a statement that between September 1st and 10th "such unclaimed moneys still remaining will be paid to the state comptroller and that it" (the insurance company) "shall thereupon cease [fol. 21] to be liable therefor" (Sec. 702(3) (c) (iii)). Proof of publication must be filed with the Comptroller (Sec. 702(4). The cost of publication "shall be charged pro rata against all abandoned property held or owing by" the insurance company "except abandoned property of individual amounts of less than ten dollars" (Sec. 1409).

(f)

The statute also provides that the statutes of limitation which may bar a claim against an insurance company on such a policy "shall not prevent any such money or property from being deemed abandoned property" and shall not be a defense in any suit by the Comptroller to compel the insurance company to report and pay the same to him (Sec. 1400).

(g)

The statute also provides that the "care and custody" of the payments is "assumed" by the state "for the benefit of those entitled to receive the same, and the state shall hold itself responsible for the payment of all claims established thereto pursuant to law, less any lawful deductions, which cannot be paid from the abandoned property fund" (Sec. 1404(1)(i)).

(h)

The statute also provides that upon making payment to the Comptroller the insurance company "shall immediately [fol. 22] and thereafter be relieved and held harmless from any or all liability for any claim" as to "any such abandoned property" (Sec. 1404(2)), and cannot be sued "for the recovery of abandoned property paid to the state comptroller" or "for interest thereon subsequent to the date of the report" (Sec. 1404(3)(a)), or for "damages alleged to have resulted from such payment" Sec. 1404(3)(c)).

(i)

The statute also provides, as to interest, that "no owner of abandoned property shall be entitled to receive interest on account of such abandoned property from and after the date a report of such abandoned property is made to the state comptroller" (Sec. 1405).

(j)

The statute also provides that claims to such "abandoned property" paid to the Comptroller may be filed with the Comptroller, who is given authority to determine the claims, subject to a review by the Supreme Court, Albany County (Sec. 1406(1)(a) and (b)). Claims "shall be paid out of the abandoned property fund and the comptroller shall not be liable in any action for any claim paid by him in good faith" (Sec. 1407). A service charge of 1%, but less than $3, is to be deducted by the Comptroller from all claims paid, and if the abandoned property fund is insufficient to pay all claims allowed, the legislature is to appropriate sufficient funds (Sec. 1407).

[fol. 23]

(k)

The statute also provides a penalty of $100 a day against each company for delay in reporting, etc., unless the penalty is waived by the Comptroller (Sec. 1412).

(l)

The Comptroller claims that the statute applies although actually nothing is payable under the terms of a policy when no claim or proof has been filed with the company; and although a policy may have been delivered in another State, and the premiums paid in another State; and although a policy may have been applied for and obtained in another State by an employer, creditor, partner, husband, wife or parent, or other person, for his or her own benefit, upon the life of a resident of this State; and although it is impossible to know what amount, if any, might be payable on a policy, if a claim and proofs were submitted, since the companies rarely have any knowledge or adequate information as to the correct age of the insured, or as to the cause of his death, or as to whether there was fraud or misrepresentation, or breach of conditions, etc., which

may determine what amount, if anything, would be payable on a policy upon the filing of a proper claim and proof, as required by the terms of the policies.

(m)

The Comptroller also claims that the statute applies retroactively to policies issued and delivered prior to the enactment of the statute, and regardless of whether the [fol. 24] contract was made in this State or some other State, and regardless of where the insured, or the beneficiary, or the assignee resides or resided at the time of or prior to the enactment of the statute.

26

The companies claim that the statute is unconstitutional and void as to foreign life insurance companies, under the Constitutions of the United States and of the State of New York, and the following provisions thereof:

(a)

Constitution of the United States

14th Amendment ("* * * Nor shall any State deprive any person of * * * property, without due process of law * * *.")

Art. I, Sec. 10 ("No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *.")

Art. I, Sec. 8 ("The Congress shall have Power * * * to regulate commerce * * * among the several States * * *" and to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *.")

(b)

Constitution of the State of New York

Art. I, Sec. 6 ("No person shall be deprived of * * * property without due process of law.")

Art. I, Sec. 7(a) ("Private property shall not be taken for public use without just compensation.")

[fol. 25] Art. I, Sec. 11 ("No person shall be denied the equal protection of the laws of this State * * *.")

Art. III, Sec. 19 ("No claim against the State shall be audited, allowed or paid which, as between citizens of the State, would be barred by lapse of time.")

27

The companies claim that the statute is unconstitutional and void as to foreign life insurance companies by reason of the matters herein set forth, including the following:

(a)

The companies are contractors, i.e., insurers, not bankers, depositories, pledgees or bailees, and not debtors as to policies under which no claims and proofs of loss have been submitted, and the assets of the companies are their own property, and the statute attempts to take their property without due process of law and without just compensation, and attempts to impair the obligations of the policies issued by them.

(b)

The situs of the assets of the companies, and of any obligations which may become payable under policies issued by them, upon receipt of a proper claim and due proof required by the policies, are the States in which the plaintiffs are incorporated, not the State of New York, and the statute attempts to take without due process of law, and without just compensation, property the situs of which is outside of the boundaries of this State.

[fol. 26] (c)

The statute attempts to change the terms and impair the obligation of policies issued, made and delivered in other States, if the insurance was upon the life of a person who resided in this State when the policy was issued; and regardless of whether the policies were applied for and obtained by a resident of some other State such as an employer, creditor, partner, husband, wife or parent, or other person, for his or her own benefit, upon the life of a resident of this State; and by reason of such policies the statute attempts to take the property of the companies without due process of law and without just compensation.

(d)

The statute provides no means or due process for determining whether or not such persons were residents of New York when the policies were issued.

(e)

That the statute attempts retroactively to change the terms and impair the obligation of policies made, issued or delivered in this State, and in other States, prior to the enactment of the statute; and regardless of where the insured, beneficiary or assignee may have resided at the time of its enactment; and, upon so doing, to thereupon take the companies' property without due process of law and without just compensation.

[fol. 27] (f)

No moneys are "held or owing" under the policies issued by the companies unless and until proper claims and due proof are furnished to the companies, and the statute attempts to change and impair the obligations of the contracts and to dispense with the performance of the contracts by policyholders, and to create liabilities under the policies which do not exist, and to nullify many of said provisions thereof affecting the amount which may be payable thereunder; and, upon so doing, to thereupon take the companies' property without due process of law and without just compensation.

(g)

The statute attempts to, but does not, create a valid defense to suits upon the policies, or for interest thereon, which may be brought against the companies in other States, or even in this State, especially as to policies which were not delivered in this State, or which were issued prior to the statute, and, after the companies pay to the Comptroller, they may be subjected to the peril and expense of litigation in this State, or in other States, and to the fees of the claimants' attorneys when the companies are sued in some States, and to heavy penalties for delay in payment under the laws of some States, none of which can be recovered by the companies from this State, and in such suits in other States the

judgments may not be binding upon the Comptroller or upon this State, and the companies may be exposed to double liability, and, in any event, are deprived of the service charge of 1% or more charged by this State on all [fol. 28] funds paid to it under the statute, all of which is part of the scheme and effect of the statute to impair the obligation of the policies issued by the companies and to take their property without due process of law and without just compensation.

(h)

The statute compels the companies to publish notices waiving all statutes of limitation and defenses based thereon, and also requires the companies to pay to the Comptroller even though all claims under the policies may be barred by the statutes of limitation, thereby denying the companies the equal protection of the laws of this State (N. Y. Constitution, Art. I, Sec. 11).

(i)

The provision of the statute that this State shall pay claims of insureds, beneficiaries, et al., to the money to be paid by the companies to the Comptroller, regardless of whether the claims would be barred by the statutes of limitation, is in violation of the constitutional provision that "no claim against the State shall be audited, allowed or paid which, as between citizens of the State, would be barred by lapse of time" (N. Y. Constitution, Art. III, Sec. 19).

(j)

The cost of publication of the notices required by the statute is a taking of the companies' property without due process of law and without just compensation, and the provision in the statute that the company may charge such [fol. 29] cost against the policies is invalid and no protection in suits against the companies in other States, or even in this State, especially as to policies which were delivered in other States, or which were issued prior to the statute, and the effect thereof is to impair the obligation of the policies.

(k)

The statute attempts to put this State into the life insurance business on a national scale, with policyholders

throughout the United States, and even in foreign countries, and attempts to take over all of the functions of the companies as to such policies, after payment to the Comptroller, including the receiving of claims thereunder and the investigation, allowance, disallowance, and payment of claims thereunder, and awards this State a service charge of 1% or more, and deprives the companies of their right to do these things and to conduct their business with their members, and policyholders, in the manner lawfully agreed in the policies, and authorized by their charters, and prevents them from making adjustments of disputed claims, except at their peril, and virtually liquidates and takes over this part of the companies' business merely because the persons on whose lives the insurance was issued may have resided in this State many years ago when the policies were issued, and although such persons may never have had the slightest interest in the policies, and although the policies may have been delivered in other States, and although no one interested in the policies may have ever been in this State, or may have changed his residence there-[fol. 30] from years before the statute was enacted, all of which violates the constitutions of this State and of the United States, including the constitutional provisions referred to.

(l)

As to many policies heavy losses are necessarily incurred due to fraud, misrepresentation or unjust claims, and litigation thereof, etc., which losses must fall upon the companies and their members, their other policyholders, and, in turn, when no claim is made under a policy, possibly because the insured or beneficiary knew that the policy was unenforceable for some reason, the possible gain belongs to the company and its members, its policyholders, and the statute attempts to take such property and rights from them without due process of law and without just compensation.

(m)

The business of life insurance as conducted by the companies is interstate commerce, and the companies are engaged in interstate commerce with respect to the business of insurance to which the statute applies, and the statute is a burden upon and an interference with such interstate commerce.

(n)

The States of Michigan, Pennsylvania and Kentucky have enacted similar statutes which, although vague and ambiguous, apparently provide for the payment to those States of the proceeds of insurance policies as abandoned property, and the legislatures of other States are contemplating [fol. 31] similar legislation, and if the companies are to have any constitutional protection against the penalties and requirements of such statutes of the various States, including this State, it is essential that such statutes have a sound constitutional basis, since otherwise the companies will frequently have to pay two or more States, and will eventually have to pay again to the proper claimant or claimants, if any.

28

The Comptroller of the State of New York intends to enforce the statute in accordance with its terms, and in accordance with the interpretation which he has placed upon it as hereinbefore described, and to require the reports, publication and payments specified by the statute, amounting to many thousands of dollars, and he is proceeding to enforce said statute and threatens to continue to do so, against the plaintiff companies and other foreign insurance companies.

29

If the companies comply with the statute they will suffer heavy and irreparable loss, injury and damage, and if they fail to comply each company will be subject to a penalty of $100 a day under Sec. 1412 of such statute, and equitable relief, including injunctions against the enforcement of the statute and the penalties thereof during the pendency of this action and permanently, is the only remedy of the companies, there being no adequate remedy at law, and an actual controversy exists between the plaintiff companies and the defendant Comptroller in regard to the constitutionality and validity of said statute.

[fol. 32] Wherefore, the plaintiffs respectfully pray for judgment as follows:

A.

Declaring that the Abandoned Property Law of the State of New York, as amended, and especially Chapters 498

(Sec. 2) and 497 of the laws of 1944 of the State of New York, and the statute which they amend, Chapter 697 of the laws of 1943 of the State of New York, are unconstitutional and void insofar as they apply to the plaintiffs and other foreign life insurance companies, and that said statutes, in their entirety, and the provisions thereof if construed separately, violate the Constitutions of the United States and of the State of New York, and the provisions thereof as hereinbefore mentioned.

B

Declaring that the plaintiffs and other foreign life insurance companies are not required to obey said statutes, and declaring the rights and legal relations of the parties in regard thereto.

C

Enjoining and restraining the defendant Comptroller of the State of New York, his successors and agents, and all other persons acting or attempting to act under or by virtue of said statutes, from enforcing or attempting to enforce said statutes, or any of the provisions or penalties thereof, against the plaintiffs or other foreign insurance companies, and that such an injunction be granted during [fol. 33] the pendency of this action and be made permanent by the final judgment herein.

D

Granting such other and further relief as may be just and equitable.

Ganson J. Baldwin, Attorney for the Plaintiffs, 72 Wall Street, New York 5, N. Y.

(Verified by Ganson J. Baldwin on June 8, 1945.)

Exhibit "A" Annexed To Complaint

Text of the Abandoned Property Law of the State of New York, as amended, insofar as it applies to life insurance companies, being Chapter 697 of the Laws of 1943, as amended by Chapters 497 and 498 (Sec. 2) of the Laws of 1944, also known as Chapter 1 of the Consolidated Laws of the State of New York.

Note:

In Sec. 103 the words in italics were added, and the words in brackets were deleted, by Chapter 498 (Sec. 2) of the Laws of 1944 (which is Exhibit B), thereby making the statute apply to foreign life insurance corporations.

In Secs. 700, 701, 702 and 703, the words in italics were added, and the words in brackets were deleted, by Chapter 497 of the Laws of 1944 (which is Exhibit C).

[fol. 34] ARTICLE I—SHORT TITLE; DECLARATION OF POLICY; DEFINITIONS

§ 101. Short title.

This chapter shall be known and may be cited as the "Abandoned Property Law."

§ 102. Declaration of policy.

It is hereby declared to be the policy of the state, while protecting the interest of the owners thereof, to utilize escheated lands and unclaimed property for the benefit of all the people of the state, and this chapter shall be liberally construed to accomplish such purpose.

§ 103. Definitions.

* * * * * * *

(d) "[Domestic] Life insurance corporations" means any [authorized] insurer corporation [incorporated and] organized under [any] *the* laws of this state [having power] *or any foreign corporation authorized* to do either one or both kinds of insurance business authorized in paragraphs one and two of section forty-six of the insurance law, as amended from time to time.*

* Note:

The Insurance Law, Sec. 46, paragraphs 1 and 2, read as follows:

1. "Life insurance," meaning every insurance upon the lives of human beings and every insurance appertaining thereto. The business of life insurance shall be deemed to include the granting of endowment benefits; additional [fol. 35] benefits in the event of death by accident or accidental means; additional benefits operating to safeguard

the contract from lapse, or to provide a special surrender value, in the event of total and permanent disability of the insured; and optional modes of settlement of proceeds.

2. "Annuities," meaning all agreements to make periodical payments where the making or continuance of all or of some of a series of such payments, or the amount of any such payment, is dependent upon the continuance of human life, except payments made under the authority of paragraph one.

ARTICLE VII—UNCLAIMED LIFE INSURANCE FUNDS

§ 700. Unclaimed [domestic] life insurance corporation moneys.

1. The following unclaimed property held or owing by [domestic] life insurance corporations shall be deemed abandoned property:

(a) Any moneys held or owing by any [domestic] life insurance corporation which shall have remained unclaimed for seven years by the person or persons appearing to be entitled thereto under matured life insurance policies on the endowment plan issued on the lives of residents of this state.

(b) Any moneys held or owing by any [domestic] life insurance corporation which are payable under other kinds of life insurance policies issued on the lives of residents of this state where the insured, if living, would, prior to the thirty-first day of December next preceding the report re- [fol. 36] quired by section seven hundred one, have attained the limiting age under the mortality table on which the reserves are based, exclusive of

(i) any policy which has within seven years been assigned, readjusted, kept in force by payment of premium, reinstated or subjected to loan, or

(ii) any policy with respect to which such corporation has on file written evidence received within seven years that the person or persons apparently entitled to claim thereunder have knowledge thereof.

(c) Any moneys held or owing by any [domestic] life insurance corporation due to beneficiaries under policies is-

sued on the lives of residents of this state who have died, which moneys shall have remained unclaimed by the person or persons entitled thereto for seven years.

2. Any such abandoned property held or owing by a [domestic] life insurance corporation to which the right to receive the same is established to the satisfaction of such corporation shall cease to be deemed abandoned.

§ 701. Annual report of abandoned property.

1. On or before the first day of April in each year every [domestic] life insurance corporation shall make a verified written report to the state comptroller, which shall contain a true and accurate statement, as of the first day of January next preceding, of all abandoned property specified in section seven hundred, held or owing by it.

[fol. 37] 2. Such report shall set forth:

(a) The name and last known address of any person or persons appearing from the records of such [domestic] life insurance corporation to be entitled to receive any such abandoned property;

(b) The amount appearing from the records of such corporation to be due;

(c) The policy number and policy age of the insured;

(d) The date such abandoned property was payable;

(e) The names and last known addresses of each beneficiary appearing in the records of the insurer; and

(f) Such other identifying information as the state comptroller may require.

3. Such report shall be in such form and the abandoned property listed shall be classified in such manner as the state comptroller may prescribe. Names of persons appearing to be entitled to such property or of beneficiaries appearing in such report shall be listed in alphabetical order within each such classification.

4. In case any [domestic] life insurance corporation shall on the first day of January in any year neither hold nor owe any abandoned property specified in section seven hundred, it shall on or before the first day of April next succeeding

make a verified written report to the state comptroller so stating.

[fol. 38] §702. Publication of list of abandoned property

1. Within thirty days after making a report of abandoned property pursuant to the provisions of section seven hundred one, such life insurance corporation shall cause to be published a notice entitled: "Notice of names of persons appearing as owners of certain unclaimed property held by (name of life insurance corporation)."

2. Such notice shall be published once [in two newspapers published in the city or village] *a week for two successive weeks in a newspaper published in the county of the state* in which is located the last-known address of the holder of a policy under which such abandoned property is payable. [; provided, however, that if such address is in the city of New York, such publication shall be in two newspapers published in the county where such address is located. If there is only one newspaper published in any such city or village, such notice shall be published in such newspaper and in a newspaper published in the county where such address is located. If there are no newspapers published in such city or village, then such publication shall be in two newspapers published in the county where such address is located, or, if there is only one such newspaper published in such county, then in such newspaper, or, if there are no newspapers published in such county, then in a newspaper published in an adjacent county. All newspapers in which such notice shall be published shall be newspapers printed in the English language.] *If there are no newspapers published in such county then such notice shall be published in a newspaper* [fol. 39] *published in an adjacent county. If such last-known address is outside of the state of New York, such publication shall be in such newspaper published in this state as may be designated by the state comptroller. Such notices shall be published in newspapers printed in the English language.*

3. Such notice shall, in accordance with the classification prescribed by the state comptroller for the report pursuant to the provisions of section seven hundred one set forth:

(a) the names and last known addresses which were in such report, of all persons appearing to be entitled to any

such abandoned property amounting to ten dollars or more. Such names shall be listed in alphabetical order. [If, however, such life insurance corporation has reported abandoned property payable on policies whose holders' last known addresses are in more than one city or village or, in the case of New York city, more than one county, the names shall be listed alphabetically for each such city, village or county and such notice shall include only the names of the persons appearing to be entitled to abandoned property payable on policies whose holders' last known addresses are in such city, village or county;]

(b) such other information as the state comptroller may require; and

(c) a statement

(i) that a report of unclaimed amounts of moneys held or owing by it has been made to the state comptroller and [fol. 40] that a list of the names of the person or persons appearing from the records of such life insurance corporation to be entitled thereto is on file and open to public inspection at its principal office or place of business in any city, village or county where any such abandoned property is payable;

(ii) that such unclaimed moneys will be paid by it on or before the succeeding thirty-first day of August to persons establishing to its satisfaction their right to receive the same; and

(iii) that in the succeeding month of September, and on or before the tenth day thereof, such unclaimed moneys still remaining will be paid to the state comptroller and that it shall thereupon cease to be liable therefor.

4. Such life insurance corporation shall file with the state comptroller on or before the tenth day of May in each year proof by affidavit of such publication.

§703. Payment of abandoned property.

1. In such succeeding month of September, and on or before the succeeding tenth day thereof, every such [domestic] life insurance corporation shall pay to the state comptroller all abandoned property specified in such report, excepting such abandoned property as since the date of such report shall have ceased to be abandoned.

2. Such payment shall be accompanied by a statement setting forth such information as the state comptroller may [fol. 41] require relative to such abandoned property as shall have ceased to be abandoned.

§704. Life insurance departments of savings and insurance banks.

(Note: Not pertinent.)

§705. Unclaimed property held by superintendent of insurance after liquidation

(Note: Not pertinent.)

§706. Payment of abandoned property after liquidation by superintendent of insurance.

(Note: Not pertinent.)

Article XIV—General Provisions.

§1400. Statutes of limitations not a bar.

The expiration of any period of time specified by law, during which an action or proceeding may be commenced or enforced to secure payment of a claim for money or recovery of property, shall not prevent any such money or property from being deemed abandoned property, nor affect any duty to file a report required by this chapter or to pay or deliver to the state comptroller any such abandoned property; and shall not serve as a defense in any action or proceeding by or on behalf of the state comptroller to compel the filing of any report or the payment or delivery of any abandoned property required by this chapter or to enforce or collect any penalty provided by this chapter.

[fol. 42] §1404. Assumption of liability by the state.

1. The care and custody • • •

(i) • • •of all abandoned property paid to the state comptroller pursuant to this chapter, is hereby assumed for the benefit of those entitled to receive the same, and the state shall hold itself responsible for the payment of all claims established thereto pursuant to law, less any lawful deductions, which cannot be paid from the abandoned property fund.

• • • • • • •

2. Any person, copartnership, unincorporated association or corporation making a payment of abandoned property to the comptroller shall immediately and thereafter be relieved and held harmless from any or all liability for any claim or claims which exist at such time with reference to such abandoned property or which may thereafter be made or may come into existence on account of or in respect of any such abandoned property.

3. No action shall be maintained against any person, copartnership, unincorporated association or corporation, or any officer thereof, for

(a) the recovery of abandoned property paid to the state comptroller pursuant to this chapter or for interest thereon subsequent to the date of the report of such abandoned property to the state comptroller pursuant to this chapter; * * * or

(c) damages alleged to have resulted from any such payment.

[fol. 43] §1405. Interest not to run after report of abandoned property.

Notwithstanding any other provision of law, no owner of abandoned property shall be entitled to receive interest on account of such abandoned property from and after the date a report of such abandoned property is made to the state comptroller pursuant to this chapter, whether or not he was entitled to interest on such property prior to such date. No claimant to abandoned property heretofore paid to the state comptroller shall be entitled to receive interest on account of such property, whether or not he was entitled to interest on such property prior to such payment.

§1406. Claims for abandoned property heretofore or hereafter paid to the state

1. (a) Claim may be filed with the state comptroller for any abandoned property heretofore paid to the state or hereafter paid to the state comptroller pursuant to this chapter * * * (Note: Part omitted is not pertinent to life insurance.)

(b) The comptroller shall possess full and complete authority to determine all such claims and shall forthwith send written notice of such determination to the claimant. At

any time within four months thereafter, such claimant may apply for a hearing and a redetermination of his claim. After an appropriate hearing on notice, before the comptroller or person duly designated by him, the comptroller shall make and serve his final determination, which alone shall be reviewable by application to the supreme court, Albany County, upon not less than ten days' notice to the comptroller.

[fol. 44] (c) The comptroller, or any person duly designated by him, is empowered to take testimony and proofs, under oath, upon such hearing, and shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents pertinent to such hearings.

* * * * * * *

§1407. Payment by state comptroller.

Any claim which is allowed by the state comptroller or ordered to be paid by him by a court of competent jurisdiction pursuant to the provisions of section fourteen hundred six, together with such costs and disbursements as may be allowed by the court, shall be paid out of the abandoned property fund and the comptroller shall not be liable in any action for any claim paid by him in good faith. There shall be deducted by the state comptroller from any claim allowed or the amount, other than costs and disbursements allowed by the court, of any claim ordered to be paid by him by a court of competent jurisdiction, one per cent, but in no event less than three dollars, from any such payment as a service charge, and such amount shall remain in the abandoned property fund.

If during any session of the legislature there are insufficient moneys in the abandoned property fund to pay all claims which have been allowed by the state comptroller or ordered to be paid by him by a court of competent jurisdiction, the state comptroller shall so certify to the legislature, which shall appropriate from the general fund to the aban- [fol. 45] doned property fund* an amount sufficient to pay such claims.

*Note:

Whenever the Abandoned Property Fund exceeds $750,000, the excess becomes the absolute property of the State

of New York, under the State Finance Law of New York, Sec. 95.

§1408. Verification.

Any report required to be verified by this chapter shall be verified, if made by a person by such person, if made by a partnership by one of the members thereof, if made by an unincorporated association or private corporation by the president or by a vice-president and one other principal officer thereof, and if made by a public corporation by the chief fiscal officer thereof.

§1409. Payment for publication

Any amount paid by a person to a newspaper or newspapers for any publication of names as required by this chapter shall be charged prorata against all abandoned property held or owing by such person at the time of such publication, except abandoned property of individual amounts of less than ten dollars.

§1410. Designation of newspapers

Any notice required by this chapter shall be published in such newspapers as shall be designated by the state comptroller, except that in no case shall a notice be published in a newspaper other than one specified in the section requiring such publication.

[fol. 46] §1411. Waiver of publication

The state comptroller may waive the publication of any notice required by this chapter, except a notice required by section fourteen hundred two, whenever in his opinion the cost of publishing such notice would be unreasonable in relation to the amount of abandoned property.

§1412. Penalty for failure to report or file

Any person failing to make any report or to file any affidavit required by this chapter shall forfeit to the people of the state the sum of one hundred dollars for each day such report or affidavit shall be delayed or withheld, except that the state comptroller may extend the time for making any such report or filing any such affidavit and may waive the payment of any penalty or part thereof provided for by this section.

§1413. Penalty for fraudulent returns

The making of a wilful false oath in any report required under the provisions of this chapter shall be perjury and punishable as such according to law.

§1501. Constitutionality

If any part, provision or section of this chapter, or the application of any such part, provision or section in any particular respect, shall be adjudged by any court of competent jurisdiction to be unconstitutional or ineffective in whole or in part, such judgment shall be confined in its operation to the particular provision or section or application directly involved in the controversy in which such judgment shall [fol. 47] have been rendered and shall not affect, impair or invalidate the remainder of such provisions or sections or their application in other respects; and to the extent that such provisions or sections are not unconstitutional or ineffective, they shall remain in full force and effect.

EXHIBIT "B" ANNEXED TO COMPLAINT

Chapter 498 of the Laws of New York

An Act to amend the abandoned property law, generally

Became a law April 1, 1944, with the approval of the Governor. Passed, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

* * * * * * *

Section 2. Paragraphs (d) * * * of section one hundred three of such chapter (note: referring to Chapter 697 of the Laws of 1943) are hereby amended to read respectively as follows:

(d) "Life insurance corporation" means any insurer corporation organized under the laws of this state or any foreign corporation authorized to do either one or both kinds of insurance business authorized in paragraphs one and two of section forty-six of the insurance law, as amended from time to time.

* * * * * * *

[fol. 48] EXHIBIT "C" ANNEXED TO COMPLAINT

Chapter 497 of the Laws of New York

An Act to amend the abandoned property law, in relation to life insurance corporations

Became a law April 1, 1944, with the approval of the Governor. Passed, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section seven hundred of chapter six hundred ninety-seven of the laws of nineteen hundred forty-three, entitled "An act in relation to escheated and abandoned property, constituting chapter one of the consolidated laws," is hereby amended to read as follows:

§ 700. Unclaimed life insurance corporation moneys.

1. The following unclaimed property held or owing by life insurance corporations shall be deemed abandoned property:

(a) Any moneys held or owing by any life insurance corporation which shall have remained unclaimed for seven years by the person or persons appearing to be entitled thereto under matured life insurance policies on the endowment plan issued on the lives of residents of this state.

(b) Any moneys held or owing by any life insurance corporation which are payable under other kinds of life insurance policies issued on the lives of residents of this [fol. 49] state where the insured, if living, would, prior to the thirty-first day of December next preceding the report required by section seven hundred one, have attained the limiting age under the mortality table on which the reserves are based, exclusive of

(i) any policy which has within seven years been assigned, readjusted, kept in force by payment of premium, reinstated or subjected to loan, or

(ii) any policy with respect to which such corporation has on file written evidence received within seven years that the person or persons apparently entitled to claim thereunder have knowledge thereof.

(c) Any moneys held or owing by any life insurance corporation due to beneficiaries under policies issued on the lives of residents of this state who have died, which moneys shall have remained unclaimed by the persons or persons entitled thereto for seven years.

2. Any such abandoned property held or owing by a life insurance corporation to which the right to receive the same is established to the satisfaction of such corporation shall cease to be deemed abandoned.

Section 2. Subdivision one of section seven hundred one of such chapter is hereby amended to read as follows:

1. On or before the first day of April in each year every life insurance corporation shall make a verified written report to the state comptroller, which shall contain a true and [fol. 50] accurate statement, as of the first day of January next preceding, of all abandoned property specified in section seven hundred, held or owing by it.

Section 3. Paragraph (a) of subdivision two of section seven hundred one of such chapter is hereby amended to read as follows:

(a) The name and last known address of any person or persons appearing from the records of such life insurance corporation to be entitled to receive any such abandoned property;

Section 4. Subdivision four of section seven hundred one of such chapter is hereby amended to read as follows:

4. In case any life insurance corporation shall on the first day of January in any year neither hold nor owe any abandoned property specified in section seven hundred, it shall on or before the first day of April next succeeding make a verified written report to the state comptroller so stating.

Section 5. Section seven hundred two of such chapter is hereby amended to read as follows:

§ 702. Publication of list of abandoned property

1. Within thirty days after making a report of abandoned property pursuant to the provisions of section seven hundred one, such life insurance corporation shall cause to be

published a notice entitled: "Notice of names of persons appearing as owners of certain unclaimed property held by (name of life insurance corporation)."

[fol. 51] 2. Such notice shall be published once a week for two successive weeks in a newspaper published in the county of the state in which is located the last-known address of the holder of a policy under which such abandoned property is payable. If there are no newspapers published in such county then such notice shall be published in a newspaper published in an adjacent county. If such last-known address is outside of the state of New York, such publication shall be in such newspaper published in this state as may be designated by the state comptroller. Such notices shall be published in newspapers printed in the English language.

3. Such notice shall, in accordance with the classification prescribed by the state comptroller for the report pursuant to the provisions of section seven hundred one, set forth:

(a) the names and last known addresses which were in such report, of all persons appearing to be entitled to any such abandoned property amounting to ten dollars or more. Such names shall be listed in alphabetical order.

(b) such other information as the state comptroller may require; and

(c) a statement

(i) that a report of unclaimed amounts of money held or owing by it has been made to the state comptroller and that a list of the names of the person or persons appearing from the records of such life insurance corporation to be entitled thereto is on file and [fol. 52] open to public inspection at its principal office or place of business in any city, village or county where any such abandoned property is payable;

(ii) that such unclaimed moneys will be paid by it on or before the succeeding thirty-first day of August to persons establishing to its satisfaction their right to receive the same; and

(iii) that in the succeeding month of September, and on or before the tenth day thereof, such unclaimed moneys still remaining will be paid to the state comp-

troller and that it shall thereupon cease to be liable therefor.

4. Such life insurance corporation shall file with the state comptroller on or before the tenth day of May in each year proof by affidavit of such publication.

Section 6. Subdivision one of section seven hundred three of such chapter is hereby amended to read as follows:

1. In such succeeding month of September, and on or before the succeeding tenth day thereof, every such life insurance corporation shall pay to the state comptroller all abandoned property specified in such report, excepting such abandoned property as since the date of such report shall have ceased to be abandoned.

Section 7. This act shall take effect June first, nineteen hundred forty-four.

[fol. 53] In Supreme Court of New York, County of New York

Answer

The defendant above named for his answer to the complaint in the above-entitled action:

I. Denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in the paragraphs of the complaint numbered "2," "3," "4," "5," "6," "7," "8," "9," "10," "11," "12," "13," "14" (including subdivisions "a"-"i"), "15," "16," "17," "18," "19," "20," "21" and "22."

II. Denies each and every allegation contained in the paragraphs of the complaint numbered "26" (including subdivisions "a"-"b"), "27" (including subdivision "a"-"n") and "29."

III. Denies each and every allegation contained in the paragraph of the complaint numbered "23" except that he admits that the statutes therein mentioned were enacted and amended as is shown on the statute books of the State of New York.

IV. Denies each and every allegation contained in the paragraph of the complaint numbered "24" except that he

admits that the Abandoned Property Law of the State of New York (Chap. 697 of the Laws of 1943 as amended) pertains to and includes abandoned funds of various types as set forth in said statute.

V. Denies each and every allegation contained in the paragraphs of the complaint numbered "25" (including subdivisions "a"-"m") and "28" except that he admits [fol. 54] that it is the duty and the intention of the defendant to administer the Abandoned Property Law of the State of New York as the same is contained and set forth in the statute books of the State of New York.

Wherefore, the defendant demands judgment that the complaint herein be dismissed with costs.

Nathaniel L. Goldstein, Attorney-General of the State of New York, Attorney for Defendant, Office & P. O. Address, No. 80, Centre Street, Borough of Manhattan, New York 13, N. Y.

(Verified by Archibald N. Galloway on May 28, 1946.)

In Supreme Court of New York, New York County, Special Term, Part One

[Same Title]

Opinion—Emphasis in Original

Gavagan, J.:

This motion by the Attorney General of the State of New York, for judgment on the pleadings dismissing the com- [fol. 55] plaint, presents the question of the constitutionality of Article VII of the Abandoned Property Law in so far as it purports to apply to foreign life insurance companies licensed to do business in this state, as well as other constitutional questions affecting domestic as well as foreign life insurance companies.

The action is brought by five life insurance companies, incorporated in other states but doing business here pursuant to license, against the Comptroller of the State of New York. It seeks (1) a declaratory judgment that Article VII of the Abandoned Property Law is unconstitutional and

void as to plaintiffs, and (2) an injunction against attempts by the Comptroller to enforce the statute against them.

The Abandoned Property Law provides for the turnover to the state of property unclaimed by the owners thereof for such a length of time as to justify a presumption of abandonment. A mode of procedure is set up whereby the state takes such property into its custody and utilizes the same or its proceeds for the benefit of all the people until claim is made by the true owners. The first attempt to bring life insurance policies within the statute was in 1939 (Chapter 923 of the Laws of 1939). The statute was expressly limited to domestic companies. An action was commenced by New York Life Insurance Company for judgment declaring the 1939 law unconstitutional. The suit was withdrawn, however, after the 1940 Legislature had amended the statute by restricting its application to policies "issued on the lives of residents of this state" (Ch. 602, L. 1940). In 1944 the statute was amended so as to apply also to foreign life insur- [fol. 56] ance companies authorized to issue policies of life insurance or annuities under "paragraphs one and two of section forty-six of the insurance law" (Chap. 497, 498, L. 1944). In 1945 the Legislature passed a bill eliminating foreign companies from the scope of the statute. However, the bill also made the statute applicable to all policies issued by domestic companies by removing the existing restrictions to policies issued upon the lives of residents, adopted in 1940. The bill was vetoed by the Governor, perhaps because of this proposed extension of the statute to all policies issued by domestic companies.

Article VII of the Abandoned Property Law deals with "unclaimed life insurance funds". It consists of eight sections, numbered 700 to 707 inclusive. Section 700, defining what shall be deemed abandoned property, reads as follows:

"§700. Unclaimed life insurance corporation moneys

1. The following unclaimed property held or owing by life insurance corporations shall be deemed abandoned property:

(a) Any moneys held or owing by any life insurance corporation which shall have remained unclaimed for seven years by the person or persons appearing to be entitled thereto under matured life insurance policies

on the endowment plan issued on the lives of residents of this state.

(b) Any moneys held or owing by any life insurance corporation which are payable under other kinds of life [fol. 57] insurance policies issued on the lives of residents of this state where the insured, if living, would, prior to the thirty-first day of December next preceding the report required by section seven hundred one, have attained the limiting age under the mortality table on which the reserves are based, exclusive of

(i) any policy which has within seven years been assigned, readjusted, kept in force by payment of premium, reinstated or subjected to loan, or

(ii) any policy with respect to which such corporation has on file written evidence received within seven years that the person or persons apparently entitled to claim thereunder have knowledge thereof.

(c) Any moneys held or owing by any life insurance corporation due to beneficiaries under policies issued on the lives of residents of this state who have died, which moneys shall have remained unclaimed by the person or persons entitled thereto for seven years.

2. Any such abandoned property held or owing by a life insurance corporation to which the right to receive the same is established to the satisfaction of such corporation shall cease to be deemed abandoned."

Section 701 provides that on or before each April first every life insurance company shall make a report to the Comptroller of property deemed abandoned by virtue of the provisions of section 700. Section 702 requires each company, within thirty days after its report to the Comptroller, [fol. 58] to publish a list of persons appearing to be the owners of unclaimed property held by the company. The list is to be accompanied by a statement that moneys unclaimed by the succeeding thirty-first day of August will be paid to the State Comptroller and that the company shall thereupon cease to be liable therefor. Section 703 directs each company to pay to the Comptroller, in September, all property listed in its annual report as abandoned, except such property as shall have ceased to be abandoned since the

date of the report. Sections 704, 705 and 706 are immaterial here. Section 707, added by chapter 452 of the Laws of 1946, declares that "any life insurance corporation which has paid to the state comptroller moneys deemed abandoned property pursuant to the provisions of this article may make payment to any person entitled to all or any part thereof and shall thereby acquire all of the rights of such person to payment by the state comptroller."

Article XIV of the Abandoned Property Law, entitled "General Provisions", contains a number of sections (1400 to 1413 inclusive) applicable to all the preceding articles, including Article VII. Section 1400 provides that the expiration of the statute of limitations applicable to actions or proceedings against the insurance companies shall not prevent the claims against the companies from being deemed abandoned and shall not be a defense in a proceeding by the Comptroller to compel the filing of a report or the payment of the abandoned property to him. Section 1401 obligates the Comptroller to keep a public record of the names [fol. 59] and addresses of the persons appearing to be entitled to the abandoned property. Section 1402 requires the Comptroller to publish in October of each year a statement of the abandoned property delivered or paid over to him, with the names and last-known addresses of the persons appearing to be entitled thereto, together with a statement that a claim for the property should be filed with the Comptroller and that a service charge of one per cent, but not less than $3, must be retained by the Comptroller in connection with each claim allowed or established. Section 1403 is not material here. Section 1404 declares that the care and custody of the abandoned property paid to the state is "hereby assumed for the benefit of those entitled to receive the same, and the state shall hold itself responsible for the payment of all claims established thereto pursuant to law, less any lawful deductions, which cannot be paid from the abandoned property fund". The section further relieves any company paying abandoned property to the Comptroller from all liability with reference to such property and provides that no action shall be maintained against such company for the recovery of the property or for damages alleged to have resulted from such payment. Section 1405 declares that no owner of abandoned property shall be entitled to receive interest after the date of the report of abandoned property to the Comptroller. Section 1406 pro-

vides for the filing of claims to abandoned property with the Comptroller and vests in him full authority to determine claims, subject to the power of the Supreme Court to review [fol. 60] his determination. Section 1407 requires the Comptroller to deduct from any allowed claim one per cent thereof, but not less than $3, as a service charge. It also provides for additional appropriations by the legislature when necessary to keep the abandoned property fund sufficient to pay allowed claims. The remaining sections of Article XIV are unimportant for the purposes of this motion, except perhaps section 1412, which imposes a penalty of $100 upon any person failing to file a report required by the statute, for each day that the report is delayed or withheld.

For the purposes of the present motion the allegations of the complaint must be deemed true. That pleading alleges that plaintiffs are incorporated in states other than New York and "for a great many years have done business in most of the other States of the United States pursuant to licenses granted by such States". It further appears from the complaint that the business of plaintiffs is conducted from their Home Offices, located in the states of their incorporation, where their officers, records and securities are situated; that applications for policies are obtained by agents and sent to the Home Offices for consideration, and if approved, that the policies are written at the Home Offices and sent to the agents for delivery to the applicants. Premiums are payable at the Home Offices, or, if paid to agents, are forwarded to the Home Offices. Notices as to premiums coming due and as to policy loans, interest on policy loans, lapses, etc., are mailed from the Home Offices. Loans on policies are considered and made at the Home Offices, and loan checks are drawn at the Home Offices and mailed to the [fol. 61] policyholders or to agents for delivery to policyholders. "Claims under policies must be made at the Home Offices, under the terms of the policies, which provide that upon receipt at the Home Office of 'due proof' of death, or other event, the company will pay, etc., and all claims are considered at the Home Offices, and, if allowed pursuant to the terms of the policies, are paid by checks drawn at the Home Offices."

The complaint further alleges that "policies issued by the companies upon the lives of persons who appeared to reside in this State frequently have been and are delivered

in some other State, and the premiums paid in other States"; that "policies issued by the companies frequently have been and are applied for and obtained in another State by an employer, creditor, partner, husband, wife, parent, or other person, for his or her own benefit, upon the life of a person who appeared to reside in this State"; and that "every year thousands of persons holding policies issued by the companies, including vested beneficiaries and assignees, have changed their residences from one State to another, and they continue to do so."

In the light of these allegations, plaintiffs contend that the legislature of this state had no jurisdiction or power to direct a turnover to the state of "abandoned" claims upon insurance policies issued by them on the lives of New York residents. It is important to note that the statute, as it is worded, is not limited to policies issued or delivered in New York State, as part of the business which plaintiffs are licensed to do here. Article VII is directed at all "life insurance corporations", a term defined in section 103 as [fol. 62] including "any foreign corporation authorized to do either or both kinds of insurance business authorized in paragraphs one and two of section forty-six of the insurance law as amended from time to time". Under this statute, any foreign company, authorized to do a life insurance or annuity business here, is obliged to turn over to the state the amounts of all "abandoned" insurance policies "on the lives of residents of this state". It matters not that the person on whose life the policy was written may never have had any interest in the proceeds of the policy (the policy may have been applied for by a creditor or relative of the insured). It is immaterial that the policy may have been applied for, written and delivered outside the State of New York. It is of no consequence that the policy may be payable outside the state or that the person entitled to payment, and whose failure to make claim is deemed an abandonment under the statute, may never have resided in the state. All that is necessary is that the policy insure the life of a New York resident.

It would seem to be obvious that the legislature of this state would be without jurisdiction or power to compel foreign insurance companies, *merely because they are licensed to do business here*, to turn over to the state the amounts of all unclaimed insurance policies, *wherever written and delivered, and wherever and to whomsoever payable.* Nor

would restriction of the statute to policies on the lives of New York residents alter the legal situation, irrespective of the date used for determining the insured's residence, for the residence of the person whose life is insured is not the proper criterion, by itself, for determining the situs of [fol. 63] a claim upon a policy. The policy may have been obtained on the application of someone other than the insured and it may be payable to someone other than the insured. As to policies resulting from business done outside the state and having no relation to the license to do business here, the state is without jurisdiction. In U. S. Mortgage & Trust Co. v. Ruggles, 258 N. Y. 32, the Court of Appeals declared (p. 40): "The State may not constitutionally regulate or interfere with the acts of foreign corporations outside its limits nor with the liberty of parties to take out contracts of insurance whenever they desire and collect the proceeds thereof. * * * the New York statute * * * could reach only business transacted within the State". In Mutual Life Ins. Co. v. Cohen, 179 U. S. 262, the United States Supreme Court ruled that a New York statute, prohibiting the lapsing of policies for nonpayment of premiums or interest unless a notice had been mailed prior to the due date, would be unconstitutional if it applied to policies issued in other states by foreign insurance companies. The court said (p. 269): "That the legislature of New York could not control companies not organized under its laws as to their business transacted in other States is too clear for argument". In Alaska Packers v. Industrial Accident Commission, 294 U. S. 532, the Supreme Court declared that (p. 540): "The due process clause denies to a state any power to restrict or control the obligation of contracts executed and to be performed without the state, as an attempt to exercise power over a subject matter not within its consti- [fol. 64] tutional jurisdiction". In Home Ins. Co. v. Dick, 281 U. S. 397 the same court stated (p. 410) that "It (the state) may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them".

The determination of the situs of intangibles depends on a "common sense appraisal of the requirements of justice and convenience" in the particular situation involved (Severnoe Securities Corp. v. L. & L. Ins. Co., 255 N. Y. 120, 123 [Cardozo, Ch. J.]): "The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience

requires that a legal situs be ascribed to them. The locality selected is for some purposes, the domicile of the creditor, for others, the domicile or place of business of the debtor, the place, that is to say, where the obligation was created or was meant to be discharged, for others, any place where the debtor can be found. * * * at the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions". Applying this test to the case under consideration, we find that the criterion for determining situs contained in the Abandoned Property Law, viz., the residence of the insured, is not one which satisfies the requirements of justice and convenience. The primary domicile of the debtor (the state of incorporation of the insurance company), the domicile of the creditor (the person entitled to the proceeds of the policy), the place where the contract of insurance was made, the physical location of the policy itself, and the place where the contract embodied in the policy is to be performed,— [fol. 65] these are all ignored in the statute presently under attack. That the selection of the residence of the insured as the sole criterion of situs for purposes of transferring to the state the amounts of all abandoned policy claims does not satisfy the requirements of justice and convenience must be too evident to need elaboration. States where the contracts of insurance were made, where the debtor insurance companies are incorporated, and/or where the persons entitled to the proceeds of the policies reside, certainly have better and stronger rights to assert jurisdiction over the abandoned policy claims. It is neither just nor convenient, as far as the debtors and creditors on the policies are concerned, for the State of New York to compel foreign insurers to turn over to it proceeds of policies of insurance which have no connection whatsoever with the business done by them in New York and which bear no relationship whatever to this state, except for the residence of the persons on whose lives the policies were issued. As a practical matter, hardship would be likely to result to the foreign insurers if they were obliged to yield to New York as to such policies. Compliance with the New York statute might well subject such foreign companies to double liability, complete or partial. Other states with better rights to exercise jurisdiction may pass similar statutes, and it would be no defense to the companies, as against attempts to enforce those statutes, that they had complied with the laws of New York, whose

claim to jurisdiction rested solely on the insured's residence there. Indeed, the complaint alleges that the States of Michigan, Pennsylvania and Kentucky have already enacted [fol. 66] similar statutes and that the legislatures of other states are contemplating analogous legislation. Prior to the 1946 amendment, which added section 707 to the Abandoned Property Law, plaintiffs would also have been subject to the risk that persons entitled to the proceeds of the "abandoned" insurance policies might start suits in other states whose courts would refuse to recognize as valid the provision of section 1404 which purports to relieve an insurer making payment to the New York Comptroller from liability to anyone in respect of the abandoned property turned over to the Comptroller. The 1946 amendment gave the companies who had complied with the statute the right to acquire the claimants' rights against the state, by paying the claimants the amounts of their claims. Since a "service" charge of 1% (and not less than $3) must be deducted when a claim is paid by the state, the insurance companies, even if they went to the trouble of making payments to claimants from their own funds after they had already made equivalent payments to the Comptroller, would be obliged to suffer a loss of 1% of their second payment, as well as of all interest thereon to the time they received partial reimbursement from the state. It is, therefore, apparent that the amendment leaves the companies exposed to some risk of loss, and perhaps double liability, even if they comply with our statute.

Nearly all life insurance companies do business in many states, and many do business in almost every state. To allow every state in which they do business to claim the right to custody of the amount of every "abandoned" policy [fol. 67] ever issued by them anywhere would result in chaos. Use of the residence of the insured as the determinant of jurisdiction would not be either logical or practical—not only because the insured's residence is immaterial under any recognized rule for ascertaining situs, but also for the reason that the residence of the insured is unknown to the insurer, in many instances at least (the complaint, which must be regarded as true on this motion, so alleges).

The authorities cited by the Attorney General as supporting the validity of the statute have no applicability to a legislative attempt to compel foreign corporations to turn

over to the state unclaimed funds or property *which had their origin in business transacted outside the state.* In Anderson National Bank v. Luckett, 321 U. S. 233, the court held that the State of Kentucky had the right to compel the turnover to it of unclaimed bank deposits in a national bank *located in Kentucky* because (p. 241): "The deposits are debtor obligations of the bank, *incurred* and to be performed *in the state where the bank is located* and hence are subject to the state's dominion" as (p. 248) "a part of the mass of property within the state whose transfer and devolution is subject to state control." In Security Bank v. California, 263 U. S. 282, in upholding a similar statute of California dealing with savings bank deposits, the court emphasized that (p. 283) "the bank is a California corporation and has its only place of business there," adding (p. 285): "The unclaimed deposits are debts due by a California corporation with its place of business there. * * * The debts arose out of contracts made and to be performed there. * * * The deposits are clearly intangible [fol. 68] property within the state. Over this intangible property the state has the same dominion that it has over tangible property." In Provident Institution for Savings v. Malone, 221 U. S. 660, a Massachusetts savings bank attacked as unconstitutional a Massachusetts statute. As in the Anderson and Security Bank cases, *supra*, no question of a legislative attempt to exercise extra-territorial jurisdiction was presented. The situs of the claims of depositors against the Massachusetts savings bank was clearly in Massachusetts where the deposits were made and payable. Brooklyn Borough Gas Co. v. Bennett, 154 Misc. 106, likewise involved no question of the right of a state to direct the turnover to it of property outside the state. The statute there involved related to deposits with public utility companies within the state and the action was brought by a domestic company. In holding the statute valid the court declared that (p. 114): "The jurisdiction of a State *over property within its borders* under circumstances indicating an abandonment by the owners has been repeatedly sustained" (italics supplied). In United States v. Klein, 303 U. S. 276, the statute dealt only with deposits in courts (p. 278, footnote) "in and for any district within this Commonwealth," and in a later phase of the same litigation (106 Fed. [2d] 213, certiorari denied, 308 U. S. 618) the court expressly stated (p. 215) that "in order to

give jurisdiction to the state courts the *res* must have its situs within the territorial limits of the state."

That the "abandoned" property must be actually or constructively within the territorial limits of the state appears to be recognized by the Attorney General in Point I [fol. 69] of his brief. He contends, however, that the domestic agencies of the foreign plaintiffs are to be treated as domestic corporations and that, therefore, "the situs of the debt or claim is in this State" (Point III, Attorney General's brief). The authorities cited do not support the proposition that a foreign corporation, licensed to do business in this state, is to be treated as a domestic corporation *in connection with business transacted outside the state and having no relation to its authority to do business here.* In Comey v. United Surety Company, 217 N. Y. 268, the holding was merely that a foreign corporation, licensed to engage in business in New York, and possessing a representative to receive service here, was not to be deemed absent from the state and could therefore avail itself of the statute of limitations as if it were a domestic company. Obviously this decision is not in point here. Although the court did say that *"for many purposes"* a foreign insurance company transacting business here "must be treated as a domestic insurance company and as domiciled in this state," it did not go so far as even to suggest that for the purpose of a taking over by the state of abandoned claims *arising out of business transacted outside the state* the foreign corporate debtor was to be treated as domiciled in this state. In Morgan v. Mutual Benefit Life Ins. Co., 189 N. Y. 447, cited in the Comey opinion, *supra,* and also in the Attorney General's brief, the policy had been issued in New York, to a resident of New York, by a foreign life insurance company authorized to do business here. In an action brought by the legal representatives of a pledgee of the policy to establish an equitable lien thereon, it was held that service [fol. 70] by publication upon non-resident children of the deceased insured was good because the action sought to enforce a lien upon a *res* within the state. In holding that the situs of the claim upon the policy was here, the court emphasized that *the contract of insurance was made in New York state* as part of the business which the company was licensed to transact here. In Martine v. The International Life Insurance Society of London, 53 N. Y. 339, the statement that foreign corporations doing business here

"must be regarded as domiciled by the residence of its general agents and its local organization" was qualified by the preceding words "as to the business transacted here."

That the Attorney General recognizes that the statute is unconstitutional if applied to policies written outside the state seems evident from the fact that his brief contains a statement (p. 15) that the statute is not applicable "to policies written by a foreign branch of a foreign company, even though the policy be written on the life of a resident of this State." This statement does not, however, obviate passing upon the constitutionality of the statute, as applied to policies written outside the state, for two reasons. In the *first* place, there is nothing in the literal wording of the statute itself to indicate that it was intended to apply only to policies resulting from business done within the state. It does not follow that because the statute was restricted as to foreign companies, to those authorized to do business here, that its scope was intended to be limited to policies emanating from business done here by such companies. *Secondly*, and more important, the complaint alleges and it must be deemed true for the purposes of this [fol. 71] motion to dismiss, that (paragraph 25L) the Comptroller is attempting to enforce the statute even where "a policy may have been delivered in another State, and although a policy may have been applied for and obtained in another State." The Attorney General's brief does not dispute the claim that the Comptroller has been attempting to enforce the statute even as to policies having no relation to the companies' license to do business here, nor does it state that such efforts will cease. In the circumstances, plaintiffs are entitled to obtain a definite adjudication as to the validity of the statute and of the Comptroller's rights against them thereunder.

The Attorney General's contention, that plaintiffs are not aggrieved and cannot be heard to plead the alleged infringement of the constitutional rights of the insured or of beneficiaries under the policies, appears to overlook that, as previously pointed out, payment to the comptroller might subject plaintiffs to double liability, complete or partial. If they make payment to the Comptroller in compliance with the statute they will never have another opportunity to raise the question. The words of Chief Justice Stone in Anderson v. Luckett, *supra*, are pertinent here

(pp. 242-3): "But if the statute is deficient in its provisions for notice and opportunity for hearing so that the depositors would not be bound by any proceedings taken under it, the bank would be entitled to raise the question whether its obligations to the depositors would be discharged by payment of the deposits to the state."

The conclusion arrived at, that the statute is invalid in so far as it purports to apply to policies written outside of [fol. 72] the state by foreign companies, does not, however, necessarily require a holding that it is *entirely* void, i.e., even as to policies written in this state as part of the business which the foreign companies transact here pursuant to license. Thus in Mutual Life Ins. Co. of N. Y. v. Cohen, *supra*, a statute of New York that no life insurance company doing business in that state should have the power to declare forfeited or lapsed any policies thereafter issued or renewed, for nonpayment of premium or interest, unless a premium notice had been mailed as required by the statute, was held unconstitutional as to policies written by foreign companies outside the State of New York, but valid and enforceable as to policies written in New York by the domestic agencies of the foreign insurers. The statute in the cited case, like the one here involved, purported to apply to all insurance written by any company doing business here, without containing any limitation to the insurance written here. That the unconstitutionality of the application of part of the Abandoned Property Law should not affect the validity of the statute in other respects is expressly provided for in section 1501 of that statute: "If any *part*, provision or section of this chapter, *or the application of any such part*, provision or section *in any particular respect*, shall be adjudged by any court of competent jurisdiction to be unconstitutional or ineffective *in whole or in part*, such judgment shall be confined in its operation to the particular provision or section or *application* directly involved in the controversy in which such judgment shall have been rendered and shall not affect, impair or invalidate the remainder of such provisions or sections or their *ap*- [fol. 73] *plication* in other respects; and to the extent that such provisions or sections are not unconstitutional or ineffective, they shall remain in full force and effect."

It is necessary, therefore, to consider whether the Abandoned Property Law is constitutional in so far as it attempts to legislate with respect to claims on policies written by

domestic branches or agencies of foreign life insurance companies *in this state* on the lives of residents of this state. As to such policies it would seem that the foreign companies ought to be treated as domiciled in this state. In Morgan v. Mutual Benefit Ins. Co., *supra*, the Court of Appeals said (p. 454): "As to such a claim the insurance company should be treated as a domestic insurance company and as domiciled in this state. * * * Whenever a question as to the situs of a similar claim against an insurance company doing business in a state pursuant to the statutes thereof has been directly involved in this court or in the Federal courts, and it has been sought to uphold the situs of the claim *in the state where the contract was made*, it has been sustained." (In Martine v. The International Life Insurance Society of London, *supra*, the same court declared (p. 348): "*As to the business transacted here*, the company must be regarded as domiciled by the residence of its general agents and its local organization." (Italics supplied.)

The statement in plaintiffs' brief that (p. 44) "Morgan v. Mutual Benefit Life * * * seems to have been overruled by Hanna v. Stedman, 230 N. Y. 326," may, perhaps, be true where the question to be determined is whether there is such a *res* within this state as would justify service by [fol. 74] publication on a non-resident. [It is to be noted, however, that the holding in the *Hanna* case was merely that an action in equity for interpleader, in which no specific fund had been set aside, was an action *in personam* rather than an action *in rem*, while the action in the *Morgan* case was to declare and enforce a lien on a policy claim, and that the holdings may therefore not be necessarily inconsistent.] But the *Hanna* case can hardly be deemed authority for the proposition that the state where the contract of insurance was made is without jurisdiction to pass a statute such as the one here under consideration. The fact that the action of interpleader was held to be *in personam* rather than *in rem*, is no indication whatsoever that the court which decided the case would have held that New York State, where the main office of the insurance company was located, did not possess jurisdiction to compel a turnover to it of abandoned proceeds of the membership certificates. Indeed, the position of these very plaintiffs is that the situs of the amounts owing on the abandoned policies is "the

State in which the insurance company is incorporated" (plaintiffs' brief, p. 19). As applied to the facts of the *Hanna* case, this would mean that this state would have had jurisdiction to escheat the proceeds of the membership certificates there involved had they been abandoned. The determination that an action of interpleader was not *in rem* and that the courts of this state had no jurisdiction without personal service within the state therefore has no bearing whatever on the question as to which state would have had power to take custody of the proceeds of the certificates had they been deemed abandoned for lack of claim.

[fol. 75] As to policies *written or delivered in this state* by domestic agencies of foreign life insurance companies, the situation is, as heretofore pointed out, that the domicile of the debtor companies must be deemed to be in this state. In addition, the statute, by its terms, is applicable only to policies issued on the lives of New York residents. "A common sense appraisal of the requirements of justice and convenience in (the) particular conditions" (Severnoe Securities Corp. v. L. & L. Ins. Co., *supra*, p. 123) rules out the only other possible states, viz.; (1) the domiciles of those entitled to claim the proceeds of the policies, and (2) the states of incorporation of the foreign companies.

(1) The residences of those who might at any particular time be entitled to the proceeds of the policies (either as beneficiaries, assignees or otherwise), i.e., the creditors, are obviously scattered throughout the country and elsewhere, and, in the case of unclaimed funds, often if not almost always, unknown to the insurance companies. It would, therefore, be impracticable, to say the least, to adopt the doctrine that the states of the residences of the creditors are the ones possessing jurisdiction to compel the debtor companies to turn over to them unclaimed funds. This was apparently recognized by the United States Supreme Court in *Anderson National Bank v. Luckett, supra*, for the jurisdiction of Kentucky was upheld although the depositor-creditors included non-residents of the state. The court went so far as to hold that the sheriff's posting of notice on the bulletin board of the county in which the property was located was sufficient notice to all depositors, [fol. 76] considered in conjunction with the notice given by the passage of the statute and the taking over of the property by the state. Plaintiffs themselves oppose the use of the domiciles of those entitled to make claims on the

policies as the criterion of situs, urging that (Plff's brief, p. 19) "the only practical situs for the purpose of such a statute would be the state in which the insurance company is incorporated, because that is known, whereas the domicile of the missing policyholder, or beneficiary, or assignee, is unknown."

(2) The only other possible criterion for determining situs is the state of incorporation of the foreign insurance company. Where the policy is written or delivered in New York by a domestic branch or agency of a foreign insurance company, there seems to be no justification for ascribing the situs of the claim to the main office of the company in another state. The fact that the policies may require presentation of claims at the home offices, and that checks in payment are issued at the home offices, does not seem to be as potent or compelling a consideration, for the purposes of determining which state possesses jurisdiction, as the fact that the policies were writ-en and/or delivered in New York by New York agencies of the companies and insured the lives of New York residents. The court accordingly holds that *as to such policies* the legislature of the State of New York had jurisdiction to direct the companies to turn over to its custody claims deemed to have been abandoned. It follows that compliance with the legislative mandate as to said policies will not expose the companies to [fol. 77] the risk of double liability either as the result of suits brought by claimants or by reason of similar statutes of other states. Thus in Anderson National Bank v. Luckett, *supra*, the court said (p. 624): "Since the bank is a debtor to its depositor, it can interpose no due process or contract clause objection to payment of the claimed deposits to the state, *if the state is lawfully entitled to payment, for in that case* payment of the debt to the state, under the statute, relieves the bank of its liability to depositors."

The other grounds upon which plaintiffs attack the statute as unconstitutional are equally available to domestic insurance companies. Since the 1940 amendment, which restricted the scope of the 1939 statute to policies issued by domestic companies on the lives of residents of this state, no domestic company has questioned the validity of the statute. The various contentions of the plaintiffs will be now considered *seriatim*.

It is urged that until due proofs have been filed with the companies of the occurrence of the contingencies which make the policies payable (such as death of the insured or expiration of the term of an endowment policy) the persons entitled to the benefits of the policies possess at most "inchoate or potential choses in action." Paragraph (a) of subdivision 1 of section 700 requires the turnover of unclaimed amounts of *matured* endowment policies and paragraph (c) makes like provision as to policies on the lives of residents *who have died*. Clearly, as to such policies, the failure to file formal proofs with the companies is no different in principle than the failure to produce savings bank books, the production of which savings banks uniformly make a condi- [fol. 78] tion precedent of payment. Yet the United States Supreme Court has upheld the validity of statutes, similar to our Abandoned Property Law, which have been directed at savings banks (Provident Institution for Savings v. Malone, *supra;* Security Bank v. California, *supra*), notwithstanding the absence of any statutory requirement that the bank books be produced. The only other policies covered by the statute are those specified in paragraph (b), viz., where the insured, if living, would have reached the maximum age "of the Mortality Table" (this varies from about 96 to 100, according to the Table used). It would seem that as to the amounts of such policies there is ample basis for holding that the choses in action are no longer merely potential or inchoate, and for permitting a state to take over custody, not for itself, but for the benefit of the claimants if they should ever appear.

Plaintiffs further contend that they may possess all kinds of defenses to claims upon many of the policies and that it would be unconstitutional to deprive them of such defenses. The complaint fails, however, to state any facts showing the existence of any specific defense to any specific policy. *Certainly the fact that the companies may possess valid defenses to some of the policies does not render the statute unconstitutional, in so far as other policies are concerned to which there are no valid defenses.* It is probably true that the companies may possess certain defenses to some of the policies which it would be unconstitutional to take from them by compelling a turnover to the state of the amounts of the policies. The proper remedy of the com- [fol. 79] panies in such situations is to refuse to turn over the amounts of such policies, and, if deemed advisable, to

sue for declaratory judgments, alleging the appropriate facts in the complaint. It is to be noted that some defenses which the companies might be able to assert in suits brought against them on the policies may not be available to them as grounds for refusing to make a turnover to the state. Examples are defenses based on failure to file proofs of death, etc., and also, *perhaps*, defenses of the statute of limitations (see post).

Plaintiffs also argue that the statute in reality attempts to take from them their own property, since they possess no fund or *res* specifically set aside for each policy. It is sufficient answer to observe that in the case of savings banks and national banks no specific fund or *res* is set aside for each depositor and yet similar statutes directed at such banks have been held constitutional by the highest court of the land (see *supra*) on the theory that a state may take into its custody choses in action presumed to have been abandoned.

The contention that the statute is invalid because it "attempts to substitute the State of New York as insurer under these policies, regardless of the rights and wishes of the insurance companies and their policyholders" (plaintiffs' brief, p. 21) and that the statute therefore impairs the obligations of contracts is inconsistent with the Supreme Court decisions upholding similar statutes as to national banks and savings banks. Even the fact that the statute in Provident Institution for Savings v. Malone, *supra*, provided for the state's paying a lower rate of interest than that [fol. 80] payable by the plaintiff savings bank was held not to invalidate the enactment, the court declaring that it was not open to the bank to raise a question which only affected its depositors.

Plaintiffs make much of the fact that section 1400 of the Abandoned Property Law deprives them of the defense of the statute of limitations in cases where they would possess such defense in actions by claimants on the policies. Here again, the fact that as to some policies they might have a good defense based on the statute of limitations would not be ground for invalidating the Abandoned Property Law in respect of its application to cases where no such defense exists. Plaintiffs' proper remedy, to raise the question, is to allege the specific facts in suits for declaratory judgment confined to the specific policies as to which plaintiffs claim to have a good defense based on the statute of

limitations. It is unnecessary, for the purposes of the present motion, to determine whether the Attorney General is correct in his contention (for which he cites Margiotti v. Cunningham, 337 Pa. 289; State v. Marshall & Illsley Bank, 291 N. W. Rep. 361; 30 C. J. S. [2d] 1170, and other authorities) that the statute of limitations does not extinguish the debt but only the creditor's remedy, and that, therefore, escheat and similar statutes, which deal with the rights of the state, rather than those of the creditors, "are not rendered invalid by reason of the fact that the statute of limitations has run against the unknown depositor or person primarily entitled to the money or property." (30 C. J. S. [2d] 1170)

The contention is also made by plaintiffs that the statute violates the provision of section 19 of Article III of the [fol. 81] New York Constitution that "no claim against the State shall be audited, allowed or paid which, as between citizens of the State, would be barred by lapse of time." This provision obviously does not apply to the rights of claimants to funds taken into the state's *custody* for their benefit. The state under the statute does not take title to the abandoned funds. Furthermore, even if the claims were interpreted as being "against the State" within the meaning of the constitutional provision, the time would not commence to run in favor of the state until it obtained delivery of the funds. The purpose of the constitution is merely to assure that no longer statute of limitations will be enacted for claims against the state than those applicable to claims against citizens of the state.

Some mention is made in plaintiffs' brief of the expense of preparing reports and arranging advertising for which, it is claimed, the companies receive no compensation. No real point is made of this, however. Section 1409 provides that any amount paid to newspapers for any publication of names required by the statute shall be charged equally against all abandoned property held or owing at the time of the publication, except abandoned property of individual amounts of less than twenty-five dollars. The expense of preparing reports of abandoned claims, equally applicable to domestic and foreign corporations, is one which the state may impose without rendering the statute unconstitutional.

The claim made in the complaint that the statute consti-

tutes an unreasonable burden upon interstate commerce has been withdrawn.

[fol. 82] The motion for judgment on the pleadings dismissing the complaint is accordingly denied, in so far as the statute is claimed to be invalid as to policies written outside the state by foreign branches of foreign insurance companies, and otherwise granted.

Dated, September 30th, 1946.

J. A. G.
J. S. C.

STIPULATION WAIVING CERTIFICATION

It is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the notice of appeal, the judgment appealed from the opinion of the Court below and all the papers upon which the Court below acted in making the judgment appealed from, and the whole thereof, now on file in the office of the Clerk of the County of New York.

Certification thereof pursuant to Section 616 of the Civil Practice Act is hereby waived.

Dated, November ——, 1946.

Ganson J. Baldwin, Attorney for Plaintiffs-Appellants; Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for Defendant-Respondent.

[fol. 83] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

ADDITION TO STATEMENT UNDER RULE 234

By an order made and entered on March 14, 1947, the Appellate Division of the Supreme Court, First Department, unanimously affirmed (without opinion) a judgment of the Supreme Court, New York County, and on March 19, 1947, a judgment of affirmance was entered thereon in the office of the Clerk of the County of New York. There has been no change of parties or attorneys.

[fol. 84] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

Please take notice that the plaintiffs hereby appeal to the Court of Appeals from a judgment of affirmance, dated March 19, 1947, and entered herein in the office of the Clerk of the County of New York on March 19, 1947.

Dated: March 20, 1947.

Yours, etc., Ganson J. Baldwin, Attorney for Plaintiffs, 72 Wall Street, New York 5, N. Y.

To Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for Defendant, and Clerk of the County of New York.

[fol. 85] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION—FIRST DEPARTMENT

Present—Hon. Francis Martin, Presiding Justice, Hon. Edward J. Glennon, Hon. Edward S. Dore, Hon. Joseph M. Callahan, Hon. David W. Peck, Justices.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, NATIONAL LIFE INSURANCE COMPANY, PENN MUTUAL LIFE INSURANCE COMPANY, and PHOENIX MUTUAL LIFE INSURANCE COMPANY (Original Plaintiffs); and AETNA LIFE INSURANCE COMPANY, THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA, THE UNION MUTUAL LIFE INSURANCE COMPANY, and THE UNION LABOR LIFE INSURANCE COMPANY (Plaintiffs Added by Stipulation), Applts.,

vs.

FRANK C. MOORE, Comptroller of the State of New York, Respt.

ORDER OF AFFIRMANCE—March 14, 1947

An appeal having been taken to this Court by the plaintiffs from a judgment of the Supreme Court, New York County, entered on the 25th day of October, 1946, except in

so far as said judgment granted some of the relief prayed for in the complaint herein, and said appeal having been [fol. 86] argued by Mr. Ganson J. Baldwin of counsel for the appellants, and by Mr. Abe Wagman of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so far as appealed from be and the same is hereby affirmed; and that the respondent recover of the appellants the costs of this appeal.

Enter,

(Signed) F. M.

In Supreme Court of New York, County of New York

The Connecticut Mutual Life Insurance Company, Massachusetts Mutual Life Insurance Company, National Life Insurance Company, Penn Mutual Life Insurance Company, and Phoenix Mutual Life Insurance Company (Original Plaintiffs); and Aetna Life Insurance Company, The Prudential Life Insurance Company of America, The Union Mutual Life Insurance Company, and The Union Labor Life Insurance Company (Plaintiffs Added by Stipulation), Plaintiffs-Appellants,

against

Frank C. Moore, Comptroller of the State of New York, Defendant-Respondent

Judgment of Affirmance

The plaintiffs above named having appealed to the Supreme Court, Appellate Division, First Judicial Depart- [fol. 87] ment, from the judgment entered in this action on the 25th day of October, 1946, in the office of the Clerk of the County of New York, and the appeal having been heard at a Term of said Appellate Division on the 26th day of February, 1947, and an order of said Appellate Division having been made and entered, affirming said judgment in so far as appealed from, with costs of said appeal to the respondent, all of the Justices concurring,

Now, On Motion of Nathaniel L. Goldstein, Attorney General of the State of New York, attorney for the respondent, it is hereby

Adjudged that said judgment, in so far as appealed from, be and the same hereby is affirmed.

Archibald R. Watson, Clerk.

Dated March 19, 1947.

Costs paid and waived.

March 19, 1947.

Nathaniel L. Goldstein, Attorney General, by: Abe Wagman, Ass't Atty. Gen.

[fol. 88] In Supreme Court of New York, Appellate Division—First Department

Present: Hon. Francis Martin, Presiding Justice; Hon. Edward J. Glennon, Hon. Edward S. Dore, Hon. Joseph M. Callahan, Hon. David W. Peck, Justices.

[Title omitted]

Order Certifying That a Constitutional Question Is Directly Involved—March 19, 1947

Pursuant to Section 593 of the Civil Practice Act, it is hereby certified that a constitutional question is directly involved in this action and in the appeal herein.

Enter:

F. M.,

P. J.

[fol. 89] Affidavit of No Opinon in the Appellate Division

State of New York,
County of New York, ss:

Ganson J. Baldwin, being duly sworn, deposes and says:

That he is attorney for the plaintiffs-appellants and is familiar with the proceedings herein. That upon the affirmance of the judgment by the Appellate Division, First Department, no opinion was handed down by said Appellate Division.

Ganson J. Baldwin,

Sworn to before me this 20th day of March, 1947. Catherine Marie Lovrich, Notary Public. Kings Co. No. 579, Reg. No. 210-L-7. Cert. filed in N. Y. Co., No. 667, Reg. No. 492-L-7. Commission expires March 30, 1947.

[fol. 90] STIPULATION WAIVING CERTIFICATION

It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, that the foregoing consists of true and correct copies of: The record on appeal to the Appellate Division, First Department, the order of affirmance, the judgment of affirmance, the notice of appeal to the Court of Appeals, all of which are now on file in the office of the Clerk of the County of New York, and the order of the Appellate Division, First Department, certifying, pursuant to Section 593 of the Civil Practice Act, that a constitutional question is directly involved.

Certification of the foregoing papers is hereby waived.

Dated, New York, March 24, 1947.

Ganson J. Baldwin, Attorney for Plaintiffs-Appellants; Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for Defendant-Respondent.

[fol. 91] IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 2nd day of July in the year of our Lord one thousand nine hundred and forty-seven, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding; John Ludden, Clerk.

REMITTITUR—July 2, 1947

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY & ORS., Appellants,

ag'st

FRANK C. MOORE, Comptroller of the State of New York, Respondent

Be It Remembered, That on the 26th day of March in the year of our Lord one thousand nine hundred and forty-seven, The Connecticut Mutual Life Insurance Company and others, the appellants in this cause, came here unto the

Court of Appeals, by Ganson J. Baldwin their attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Frank C. Moore, Comptroller of the State of [fol. 92] New York, the respondent in said cause, afterwards appeared in said Court of Appeals by Nathaniel L. Goldstein, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Ganson J. Baldwin of counsel for the appellants, and by Mr. Abe. Wagman of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgments herein be and the same hereby are modified in accordance with the opinion herein and, as so modified, affirmed with costs to the defendant State Comptroller.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgments be modified in accordance with the opinion herein and, as so modified, affirmed, etc., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according [fol. 93] to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, etc.

(S.) John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE

Albany, July 2, 1947.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(S.) John Ludden, Clerk. (Seal of the Court of Appeals.)

[fol. 94] IN COURT OF APPEALS OF NEW YORK

No. 122

THE CONNECTICUT MUTUAL LIFE INSURANCE CO., et al.,
Plaintiffs-Appellants,

against

FRANK C. MOORE, Comptroller of the State of New York,
Defendant-Respondent

OPINION

LOUGHRAN, Ch. J.:

This case presents questions as to the validity of the New York Abandoned Property Law (Cons. Laws. Ch. 1) in its application to unclaimed life insurance funds.

The gist of the relevant operative sections of the statute is as follows. Abandoned property includes any moneys, held or owing by any life insurance company which have remained unclaimed for seven years by the person or persons entitled thereto under (1) matured life insurance policies on the endowment plan issued on the lives of residents of this State; (2) other kinds of life insurance policies issued on the lives of residents of this State, where the insured, if living, would have attained the limiting age under the mortality table on which the reserves are based; (3) life insurance policies issued on the lives of residents of this State who have died. (Sec. 700). On or before April first in each year, every life insurance corporation shall make a verified written report to the State Comptroller of all such abandoned property held or owing by it. (Sec. 701). Within thirty days thereafter such corporation shall publish a newspaper notice to the persons appearing to be

entitled to any of such unclaimed moneys together with a statement (1) that a list of the names of such persons is on [fol. 95] file and open to public inspection at the principal office of the corporation; (2) that payment of such unclaimed moneys will be made on or before the succeeding August thirty-first, to persons establishing their right thereto; and (3) that in the succeeding September such unclaimed moneys still remaining will be paid to the State Comptroller, after which the insurance corporation shall cease to be liable therefor. (Sec. 702). Such payment shall be made to the State Comptroller at the time so fixed (Sec. 703). Thereupon the care and custody of such property shall pass to the State, the State shall be responsible for all claims established thereto pursuant to law less any lawful deductions, and the insurance corporation shall be relieved of liability for any such claim (Sec. 1404).* The State Comptroller shall publish annual statements of abandoned property received by him and not paid to claimants (Sec. 1402). Claims may be filed with him for such property and his determination thereof shall be subject to review in the courts (Sec. 1406). The statute shall be enforced notwithstanding the bar of any statute of limitations (Sec. 1400).

Whether these parts of the statute should be declared unconstitutional is the question for decision. The plaintiffs are a number of foreign life insurance companies that are licensed to do business in this State. The State Comptroller is the defendant. Upon motions made by all parties for a decision on the pleadings, Special Term annulled the Statute in so far as it pertains to policies of life insur- [fol. 96] ance issued for delivery outside the State of New York, but upheld the challenged provisions in all other respects, except that the court put aside an issue as to the unlawful operation thereof upon defenses that life companies may have to claims upon their insurance contracts. From

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* Section 707, added by L. 1946, ch. 452, further provides: "Any life insurance corporation which has paid to the state comptroller moneys deemed abandoned property pursuant to the provisions of this article may make payment to any person entitled to all or any part thereof and shall thereby acquire all of the rights of such person to payment by the state comptroller."

so much of the judgment of Special Term as denied relief prayed for by them, the plaintiff companies appealed to the Appellate Division, and, when a unanimous affirmance followed, they brought the case to this Court as of right on the basis of the constitutional questions that are directly involved. Since the defendant State Comptroller has at all times been content with the decision of Special Term, we are here concerned only with the effect of the statute upon presumptively abandoned proceeds of insurance policies issued upon the lives of residents of this State and delivered within its borders by companies doing business here, and what follows has reference to policies so issued and delivered and to no others.

Each of the plaintiff companies has its home office outside this State. By his motion for judgment on the pleadings, the defendant State Comptroller constructively admits the following allegations of the complaint: "The business of the plaintiffs, and other life insurance companies, is conducted from their Home Offices, where their officers, records, and securities are situated. Applications for policies are obtained by agents throughout the United States, and are sent to the Home Offices for consideration, and, if approved, the policies are written at the Home Offices and are sent to the agents for delivery to the applicant. Premiums are payable at the Home Offices, or, if paid to an agent, are forwarded to the Home Offices. Claims under policies must be made at the Home Offices, under the terms of the policies, [fol. 97] which provide that upon receipt at the Home Office of 'due proof' of death, or other event, the company will pay, etc., and all claims are considered at the Home Offices, and, if allowed pursuant to the terms of the policies, are paid by checks drawn at the Home Offices." On the strength of the above circumstances, the plaintiff companies insist that their debtor obligations under the contracts in question are beyond the territorial reach of the power of the New York Legislature.

Other defects imputed to the statute by the companies may be summarized in this manner: it cancels provisions of insurance contracts whereby the proceeds become payable only upon filing of due proof of specified events, e.g., death, age, survival, and upon surrender of the policy; it takes away defenses to policies, e.g., misrepresentation and breach of conditions; if given retrospective effect, it will operate

to revive claims which at the time of its enactment were barred by the statute of limitations. In the foregoing aspects, the statute, as the plaintiff companies see it, is not only repugnant to the due process clauses, but also impairs the obligation of contracts, takes private property for public use without making just compensation therefor and runs foul of the fundamental demand for the equal protection of equal laws. (U. S. Const. Art I, Sec. 10 and 14th Amendment; N. Y. Const. Art. I, Secs. 6, 7a).

The reason of the statute is plain enough. Section 102 says: "It is hereby declared to be the policy of the state, while protecting the interest of the owners thereof, to utilize escheated lands and unclaimed property for the benefit of all the people of the state, and this chapter shall be liberally construed to accomplish such purpose." (See *Moufang* v. *State of New York*, 295 N. Y. 121, 127-128). In accordance [fol. 98] with the object first so stated, the Legislature has substituted the State for the plaintiff companies as debtor upon the policies in question and at the same time has secured to the policy-creditors appropriate notice thereof with an opportunity to be heard and with the further right to resort to the courts should payment by the State be refused. Such a statutory scheme fulfills the procedural requirements of due process (*Anderson National Bank* v. *Luckett*, 321 U. S. 233).

In the case just cited—where approval was given to a like scheme for State administration of abandoned bank deposits remaining in a national bank within the State—the Court said: "The deposits are debtor obligations of the bank, incurred and to be performed in the state where the bank is located, and hence are subject to the state's dominion" (321 U. S. at p. 233). Here the circumstances relied upon as a justification for the exercise of State power are not essentially different. True, the policies in question were committed to writing at the home offices of the plaintiff companies in foreign states and were to be paid by checks mailed therefrom. But the policies were issued upon the lives of residents of this State and were delivered within its borders by corporations doing business therein. "Effectiveness of a policy (as the complaint says) usually depends upon its being 'delivered and the first premium paid during the lifetime and good health of the insured,' a provision which is usually contained in the policies or in the application for insurance, copies of which are attached to policies

when issued and made a part thereof." Thus the State of New York—where the policies were delivered and where presumably the first premiums *was* paid—was the place where the contracts in question were made. (*Northwestern Life Ins. Co.* v. *McCue*, 223 U. S. 234; *U. S. Mortgage &* [fol. 99] *Trust Co.* v. *Ruggles*, 258 N. Y. 32, 38; Restatement of Conflict of Laws, Sec. 318). On the whole, then, it makes no difference where the policies were signed or where payment thereof was to be initiated. For the core of the debtor obligations of the plaintiff companies was created through acts done in this State under the protection of its laws and the ties thereby established between the companies and the State were without more sufficient to validate the jurisdiction here asserted by the Legislature. (See *Curry* v. *McCanless*, 307 U. S. 357; *Hoopeston Co.* v. *Cullen*, 318 U. S. 313; *International Shoe Company* v. *Washington*, 326 U. S. 310. Cf. *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408; *Harris* v. *Balk*, 198 U. S. 215; *Morris Plan Industrial Bank of New York* v. *Cunning*, 295 N. Y. 324; *Feinman* v. *Marks*, 294 N. Y. 367).

The contention that the statute unwarrantably rescinds contractual conditions precedent such as the requirements of surrender of policies and filing of due proof of death or other specified events was rejected by the Special Term on the authority of *Provident Institution for Savings* v. *Malone* (221 U. S. 660),—a case which sustained a statute whereby banks were commanded to pay over unclaimed deposits to a State without production of pass-books as required by agreements of deposit. The cited case is quite in point. Besides the present statute calls upon the plaintiff companies to surrender moneys to this State only after maturity of the policy obligations and at a time when the State, as the then legal representative of the parties entitled to such payment, may be regarded as making demand therefor in their behalf.

"If the statute is retroactive", says the plaintiff companies, "it illegally attempts to revive claims barred by the statute of limitation." On its face, the statute appears to have been meant for retrospective application, seeing that it [fol. 100] became law on April 23, 1943, but did not take effect until June 1, 1944 (L. 1943 Vol. 1, pp. 1383 and 1415), and that the reports of abandoned property called for by section 701 must be made on or before the first day of April

"in each year." Furthermore, the clearly procedural character of the statute is reason enough for giving it a retrospective application (*Shielcrawt* v. *Moffett*, 294 N. Y. 181, 188); and if abandoned claims are to be revived thereby, this will be no offense against constitutional law. (*Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 316; *Matter of New York University (Moore)*, 296 N. Y. 913).

As has already been indicated, the court at Special Term did not decide whether or not the statute illegally deprives the plaintiff companies of defenses to claims upon their insurance contracts. We see no reason why that issue should go undetermined (Cf. *Quaker Oats Co.* v. *City of New York*, 295 N. Y. 527, 538). The plaintiff companies, as we have said, cannot resist payment to the defendant Comptroller because of (1) the statute of limitations or (2) non-compliance with policy provisions calling for due proof of death or of other designated contingency or (3) failure to surrender a policy. Except for these restrictions, however, the statute (Sec. 700) leaves any of the plaintiff companies wholly free to set up any complete or partial defense whereby it may establish that no moneys are "held or owing" by it on a particular policy, or that only some fraction of the face amount of the contract is payable thereon. Maybe, as the companies say, they cannot effectually prepare possible defenses without a proof of claim, but inconvenience of that kind does not nullify the statute. Accordingly paragraph 3 of the judgment of Special Term—which reserved decision on the question whether the statute wrongfully does away with defenses to policies—should be struck out.

As so modified, the judgments should be affirmed, with costs to the defendant State Comptroller.

[fol. 101] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

Present:

HON. FELIX C. BENUANGA, *Justice.*

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, National Life Insurance Company, Penn Mutual Life Insurance Company, and Phoenix Mutual Life Insurance Company (Original Plaintiffs); and Aetna Life Insurance Company, The Prudential Life Insurance Company of America, The Union Mutual Life Insurance Company, and The Union Labor Life Insurance Company (Plaintiffs Added by Stipulation), Plaintiffs-Appellants,

against

FRANK C. MOORE, Comptroller of the State of New York, Defendant-Respondent.

ORDER ON REMITTITUR—July 24, 1947

The above mentioned plaintiffs-appellants having appealed to the Court of Appeals from the judgment of affirmance of this Court entered upon the order of the Appellate Division of the Supreme Court, First Department, in the Office of the Clerk of the County of New York, on the 19th day of March, 1947, affirming the judgment heretofore entered in the Office of said Clerk on the 25th day of October, [fol. 102] 1946, in so far as appealed from; and the said appeal having been duly argued at the said Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said judgment so appealed from as aforesaid be modified in accordance with the opinion rendered by the said Court of Appeals, and, as so modified, be affirmed with costs to the defendant State Comptroller; now

Upon reading and filing the remittitur from the said Court of Appeals herein, and upon motion of Nathaniel L. Goldstein, Attorney General of the State of New York, attorney for the defendant State Comptroller herein, it is hereby

Ordered that the said judgment of the Court of Appeals be, and the same hereby is, made the judgment of this Court.

Enter. (Initialed) F. C. B. J. S. C.

[fol. 103] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

Petition for Appeal, Assignment of Errors and Prayer for Reversal

To the Honorable John T. Loughran, Chief Judge of the Court of Appeals of the State of New York:

PETITION FOR APPEAL.

Considering themselves aggrieved by the final judgment, dated July 2, 1947 in the above-entitled action, of the Court of Appeals of the State of New York, which is the highest Court of that State in which a decision could be had in this action, where is drawn in question the validity of the statute known as the Abandoned Property Law of the State of New York, as amended, particularly Chapters 498 (Sec. 2) and 497 of the Laws of 1944 of the State of New York, and the statute which they amend, Chapter 697 of the Laws of 1943 of the State of New York, on the ground of its being repugnant to Article I, Sec. 10 of the Constitution of the United [fol. 104] States and the Fourteenth Amendment thereto, and said judgment being in favor of its validity, the plaintiffs herein hereby pray that an appeal may be allowed to the Supreme Court of the United States from said judgment, for the reasons specified in the Assignment of Errors submitted herewith; and that an order be made in regard to the appeal bond to be given by the plaintiffs; and that a citation be issued as provided by law; and that the material parts of the record, proceedings and papers upon which said judgment was based, duly authenticated, be sent to the Supreme Court of the United States pursuant to the rules thereof.

ASSIGNMENT OF ERRORS.

The plaintiffs, the appellants, assign the following errors in the record and proceedings upon which they will rely upon their appeal to the Supreme Court of the United States:

1. The Court of Appeals of the State of New York erred in holding that the statute known as the Abandoned Property Law of the State of New York, as amended, particularly Chapters 498 (Sec. 2) and 497 of the Laws of 1944 of the

State of New York, and the statute which they amend, Chapter 697 of the Laws of 1943 of the State of New York, is valid and is not repugnant to the provisions of Article I, Sec. 10, of the Constitution of the United States, that "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *", although said statute, as construed by said Court of Appeals, provides that the plaintiffs, which are life insurance corporations incorporated in other States, must pay to the State of New York (as or in the nature of an escheat) the sums specified in the policies [fol. 105] of life insurance and endowment policies, issued by the plaintiffs, and described in the Complaint, and must make reports and newspaper publications offering and promising payment and admitting liability, all contrary to and without performance of the terms of the policies, as set forth in the Complaint, particularly:

(a) the provisions that the furnishing of due proofs of death, or other event, to the plaintiffs is a condition precedent to liability and to payment thereunder, it being conceded that no proofs of any kind have been furnished; and

(b) the provisions that if the age of the insured was understated, as concededly it frequently is, the amount of insurance under the terms of said policies shall be reduced to the amount which the premium would have purchased at the correct age, it being conceded that it is impossible to know or determine the correct amount unless and until due proofs are submitted as required by the terms of the policies; and

(c) the provisions excluding or reducing liability in case of suicide, or of death caused by war, or military service, or aviation, or if the insured was not living and in good health when the policy was delivered and the first premium paid, it being conceded that it is impossible to know or determine the amount of liability, if any, unless and until due proofs are furnished as required by the terms of the policies.

2. Said Court of Appeals erred in holding that said statute is valid and is not repugnant to the Fourteenth Amendment to the Constitution of the United States providing that "* * * Nor shall any State deprive any person of * * * property, without due process of law * * *",

although said statute, as construed by said Court of Ap- [fol. 106] peals, requires the plaintiffs to make said payments, reports and publications, described in paragraph "1" hereof:

(a) contrary to and without performance of the policy provisions described in paragraphs "1(a), 1(b) and 1(c)" hereof; and

(b) even though many defenses, total or partial, may exist to any claims which could arise under the policies, particularly defenses based upon the provisions described in paragraphs "1(a), 1(b) and 1(c)" hereof, and also defenses based upon fraud, misrepresentation, impersonation, fictitious insureds, and other frauds, it being concededly impossible to determine what defenses may apply unless and until due proof of death, or other event, is furnished as required by the terms of the policies; and

(c) even though plaintiffs are thereby deprived of all right and opportunity to receive, consider and investigate claims under said policies, and to reject or resist unjust or fraudulent claims, or to adjust doubtful claims; and

(d) even though the amounts which might become payable, if anything, under said policies is entirely speculative, and the facts essential to determining the same are entirely unknown; and

(e) even though the assets and reserves of the plaintiffs are their general property in which they have the beneficial ownership, and are not deposits or trust funds and are not ear-marked or held under or for any particular policy; and

(f) even though the effect and result is that the State of New York virtually liquidates and takes over this part of the plaintiffs' business and assets, and [fol. 107] deprives them of their property and of the right to conduct such business as authorized by their charters granted by the States in which they are incorporated; and

(g) Even though the State of New York has no jurisdiction to compel such payments and other acts (in the nature of escheat) in regard to any such policies,

the proper jurisdiction (if any debts exist thereunder) being in the State of incorporation (the domicile) of the insurance company which issued the policies.

3. Said Court of Appeals erred in holding that such policies or the face amounts thereof are matured and represent "unclaimed life insurance funds" and "debtor obligations" susceptible to escheat, and subject to the jurisdiction of the State of New York for such purpose, or a taking of that nature, and in sustaining the validity of the statute for that purpose, in that said holdings have no support in the record and are contrary to the conceded facts (mentioned briefly in these Assignments of Errors but more fully stated in the Complaint), and said holdings and statute are repugnant to Article I, Sec. 10, of the Constitution of the United States, and the Fourteenth Amendment thereto, in that they impair the obligations of said contracts and deprive plaintiffs of their property without due process of law.

4. If (contrary to the plaintiffs' contentions) any sums are to be deemed held or owing under such policies, said Court of Appeals nevertheless erred in holding that the State of New York has jurisdiction to take the same by said statute as an escheat, or otherwise, in view of the conceded facts that the State of incorporation of each of the plaintiffs, not the State of New York, is the place where they are payable, and where all claims must be made, where [fol. 108] the assets of the insurance company are located, where premiums are payable, where claims are paid and policy loans made, where the officials and records of the company are located, and where all other business relating to the policies is transacted, other than the solicitation of insurance and delivery of policies by local agents in various States, as more fully set forth in the Complaint; and that the whereabouts or domiciles of the holders of these "abandoned" policies are unknown; and that every year many thousands of policyholders move from one State to another; and that the residences of the insureds at the time that the policies were issued and also the place of delivery thereof (the factors upon which said Court holds the State of New York has jurisdiction) are unknown and impossible to determine and would always be uncertain and impractical factors (and the plaintiffs claim that such factors are of no legal or practical materiality in deter-

mining situs and jurisdiction for the purpose of escheat); and therefore the statute and the holding of said Court are repugnant to the Fourteenth Amendment to the Constitution of the United States in that they deprive the plaintiffs of their property without due proces of law and expose them to full liability under the same policies to the State of New York and to the State having jurisdiction, and to the policyholders who may sue in any State.

5. Said Court of Appeals erred in affirming, as modified, and in failing to reverse, the judgments and orders of the lower courts of the State of New York, to wit, the judgment of affirmance of the Supreme Court of the State of New York dated March 19, 1947, entered upon the order of affirmance dated March 14, 1947, of the Appellate Division, First Department, of said Supreme Court, which judgment [fol. 109] and order affirmed the judgment of the Supreme Court of the State of New York, for the County of New York, the court of first instance, dated October 24, 1946, and said Court of Appeals erred in failing to declare said statute to be entirely void in its application to foreign life insurance companies and to said policies issued by them, and in so doing erred in rejecting the plaintiffs' contentions that said statute is repugnant to Article I, Sec. 10, of the Constitution of the United States, and the Fourteenth Amendment thereto, in that it impairs the obligations of said contracts and takes the plaintiffs' property without due process of law, under the facts set forth in the Complaint, all of which are conceded, and for the reasons therein stated.

PRAYER FOR REVERSAL

Wherefore, your petitioners pray that the said final judgment of the Court of Appeals of the State of New York made and dated July 2, 1947, be reversed with directions to reverse the judgment of the Supreme Court of the State of New York, County of New York, dated October 24, 1946, and to reverse the order of affirmance of said judgment by the Appellate Division, First Department, of said Supreme Court dated March 14, 1947, and to reverse the judgment of affirmance dated March 19, 1947, entered in said Supreme Court, New York County, upon said order of affirmance, and said statute should be declared to be entirely void in its application to foreign life insurance companies in that it

is repugnant to said provisions of the Constitution of the United States, and its enforcement should be enjoined accordingly.

Dated: August 15, 1947.

Ganson J. Baldwin, Attorney for Plaintiffs-Appellants, 72 Wall Street, New York, 5, N. Y.

[fol. 110] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The plaintiffs-appellants named above having presented their Petition for Appeal, praying that they be permitted to take an appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, made and dated July 2, 1947, in the above-entitled cause, and having also made and presented with said petition their Assignment of Errors and Prayer for Reversal, and their Statement as to Jurisdiction; it is hereby

Ordered that said appeal be, and the same hereby is, allowed as prayed for; and it is further

Ordered that said plaintiffs-appellants shall give good and sufficient surety in the sum of $500 that they shall prosecute their appeal to effect, and, if they fail to make their plea good, shall answer all damages and costs, and said plaintiffs-appellants now presenting a surety bond to [fols. 111-112] such effect, such bond is hereby approved; and it is further

Ordered that this order and said bond and the papers hereinbefore referred to, namely, said Petition for Appeal, Assignment of Errors and Prayer for Reversal and Statement as to Jurisdiction, shall be filed by the Clerk of the Supreme Court of the State of New York for the County of New York with the record of this cause, and that said Clerk shall prepare and certify the transcript of the record and proceedings in the above cause and transmit the same to the Supreme Court of the United States within forty (40) days from the date hereof, the papers to be so certified

and transmitted to be such as may be stipulated by the parties or designated by Praecipe pursuant to the rules of the Supreme Court of the United States.

Dated: August 15, 1947.

John T. Loughran, Chief Judge of the Court of Appeals of the State of New York.

[fols. 113-114] Citation in usual form omitted in printing.

[fol. 115] In Supreme Court of the United States

[Title omitted]

Praecipe for Transcript of Record

To the Clerk of the Supreme Court of the State of New York, County of New York:

In connection with the preparation of the transcript of record on appeal herein the appellants request that you prepare and include as part of such transcript the following and certify the same to the Supreme Court of the United States:

1. All of the papers included in the printed Record on Appeal to the Court of Appeals of the State of New York.
2. Remittitur (Judgment) of the Court of Appeals dated July 2, 1947, and the Opinion attached thereto.
3. Order dated July 24, 1947, making the judgment of the Court of Appeals the judgment of the Supreme Court of the State of New York, County of New York.
4. Petition for Appeal, Assignment of Errors and Prayer for Reversal.
5. Order Allowing Appeal.

[fol. 116] 6. Statement as to Jurisdiction.

7. Notice Calling Attention to Rule 12(3).
8. Citation on Appeal.
9. Appeal Bond.
10. This Praecipe.

Dated: August 18, 1947.

Ganson J. Baldwin, Attorney for Appellants, 72 Wall Street, New York 5, N. Y.

ACKNOWLEDGEMENT OF SERVICE

The defendant-appellee by the undersigned, his attorney, hereby acknowledges service of the papers listed in the foregoing Praecipe as items 4, 5, 6, 7, 8, 9, and 10.

August 18, 1947.

Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for Defendant-Appellee, 80 Centre Street, New York 13, N. Y.

[fols. 117-119] Bond on appeal for $500.00, approved Aug. 15, 1947, omitted in printing.

[fols. 120-121] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 122] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF RECORD—Filed September 8, 1947

Appellants, pursuant to the provisions of Paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States, state that the points upon which they intend to rely in said Court in this case are as follows:

1. Appellants hereby adopt their Assignment of Errors as and for their Statement of Points upon which they intend to rely in this case.

Appellants hereby designate for the record in this case each and every paper enumerated in their Praecipe dated August 18, 1947, as necessary for the consideration thereof.

Dated: August 18, 1947.

Ganson J. Baldwin, Attorney for Appellants, 72 Wall Street, New York 5, N. Y.

[fol. 122a] [File endorsement omitted.]

[fol. 123] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—October 20, 1947

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on cover: File No. 52567. New York Court of Appeals. Term No. 337. The Connecticut Mutual Life Insurance Company, Massachusetts Mutual Life Insurance Company, National Life Insurance Company, et al., Appellants, vs. Frank C. Moore, Comptroller of the State of New York. Filed September 9, 1947. Term No. 337, O. T. 1947.

FILE COPY

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SEP 9 1947
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 337

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, ET AL.,

Appellants,

vs.

FRANK C. MOORE, COMPTROLLER OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION

GANSON J. BALDWIN,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 337

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, NATIONAL LIFE INSURANCE COMPANY, PENN MUTUAL LIFE INSURANCE COMPANY, AND PHOENIX MUTUAL LIFE INSURANCE COMPANY (ORIGINAL PLAINTIFFS); AND AETNA LIFE INSURANCE COMPANY, THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA, AND THE UNION MUTUAL LIFE INSURANCE COMPANY (PLAINTIFFS ADDED BY STIPULATION),

Plaintiffs-Appellants,

against

FRANK C. MOORE, COMPTROLLER OF THE STATE OF NEW YORK,

Defendant-Respondent.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

Preliminary Statement

In compliance with the rules of the Supreme Court of the United States the plaintiffs-appellants named above respectfully submit this statement showing the grounds

upon which they contend that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment of the Court of Appeals of the State of New York made and entered in the above entitled cause on July 2, 1947.

I

Statutory Provisions Believed to Sustain Jurisdiction

The statutory provisions believed to sustain the jurisdiction of this appeal by the Supreme Court of the United States are contained in Sec. 237(a) of the United States Judicial Code, 28 U. S. C. 344(a).

II

Statute Involved

The statute of the State of New York the validity of which is involved is the portion of the Abandoned Property Law of the State of New York (Chapter I of the Consolidated Laws of New York) applicable to life insurance companies, particularly Chapters 498 (Sec. 2) and 497 of the Laws of 1944 of New York (pages 1021-1025), and the statute which they amend, Chapter 697 of the Laws of 1943 of New York (pages 1383-1416, particularly Art. I, pages 1384-5, and Art. VII, pages 1398-1401, and Articles XIV and XV, pages 1408-1415). The pertinent provisions of said statute are set forth in Exhibit A annexed hereto.

III

Date of Judgment and of Application for Appeal

The date of the judgment sought to be reviewed was July 2, 1947, and the date upon which the application for appeal is presented is August 15, 1947.

IV

The Nature of the Case and the Rulings in the New York Courts

The case is an action to have said Abandoned Property Law declared unconstitutional in its attempt to force payment to the State of New York (in the nature of escheat) of so-called "abandoned" policies of life insurance, including endowment policies, issued by the plaintiffs-appellants, which are life insurance companies incorporated in various other States and licensed to do business in the State of New York.

The facts are stated in the complaint and are conceded to be correct and both sides moved for judgment upon such conceded facts (R. 4-5).

In referring to the "statute" we mean to include the constructions placed upon the statute by the defendant, the State officer charged with its administration and enforcement, and the constructions placed upon the statute by the Court of Appeals.

Plaintiffs-appellants claim that the statute is repugnant to Article I, Sec. 10, of the Constitution of the United States because it impairs the obligations of the contracts in forcing the insurance companies to pay to the State of New York (as or in the nature of an escheat) the face amounts of such policies, and to make reports and newspaper publications offering and promising payment and admitting liability, all contrary to and without performance of the terms of the policies, particularly the provisions that the furnishing of due proofs of death, or other event, to the insurance companies is a condition precedent to liability and to payment (R. 13), it being conceded that no proofs of any kind have been furnished in connection with these policies (R. 19, 23, 27); and the provisions that if the

age of the insured was understated, as concededly it frequently is, the amount of insurance shall be reduced to the amount which the premium would have purchased at the correct age (R. 13-14), it being concededly impossible to know or determine the correct age or amount unless and until due proofs are submitted as required by the terms of the policies (R. 14, 23, 27); and the provisions excluding or reducing liability in case of suicide (R. 14), or of death caused by war, or military service, or aviation (R. 14-15), or if the insured was not living and in good health when the policy was delivered and the first premium paid (R. 13), it being concededly impossible to know or determine the amount of liability, if any, unless and until due proofs are furnished as required by the terms of the policies (R. 23, 27).

Plaintiffs-appellants also claim that the statute is repugnant to the Fourteenth Amendment to the Constitution of the United States because it takes the plaintiffs' property without due process of law requiring them to make the payments, reports and publications mentioned, contrary to and without performance of the policy provisions described in the preceding paragraph, and even though many defenses, total or partial, may exist to any claims which could arise under the policies, particularly defenses based upon the provisions described in the preceding paragraph, and also defenses based upon fraud, misrepresentation, impersonation, fictitious insureds, and other frauds (R. 14-15), it being concededly impossible to determine what defenses may apply unless and until due proof of death, or other event, is furnished as required by the terms of the policies (R. 23).

Plaintiffs-appellants also claim that the statute is repugnant to said provisions of Article I, Sec. 10 and of the Fourteenth Amendment because it deprives the plaintiffs

of all right and opportunity to receive, consider and investigate claims under said policies, and to reject or resist unjust or fraudulent claims, or to adjust doubtful claims (R. 29); and further because the assets and reserves of the plaintiffs are their general property in which they have the beneficial ownership, and are not deposits or trust funds and are not ear-marked or held under or for any particular policy (R. 12); and because the effect and result is that the State of New York virtually liquidates and takes over this part of the plaintiffs' business and assets, and deprives them of their property and of the right to conduct such business as authorized by their charters granted by the States in which they are incorporated (R. 29).

Plaintiffs-appellants also claim that such policies are not matured and do not represent funds or debtor obligations susceptible to escheat, or subject to the jurisdiction of the State of New York for such purpose, or a taking of that nature, and that the Court of Appeals erred in holding to the contrary and in sustaining the validity of the statute for that purpose, said holdings having no support in the record and being contrary to the conceded facts, and that said holdings and statute are accordingly repugnant to Article I, Sec. 10, and the Fourteenth Amendment by impairing the obligations of the contracts and depriving the plaintiffs of their property without due process of law.

Plaintiffs-appellants further claim that even if (contrary to their contentions) any sums are to be deemed held or owing under such policies, nevertheless the State of New York has no jurisdiction to compel such payments and other acts (in the nature of escheat), the proper jurisdiction (if anything is held or owing) being the State of incorporation (the domicile) of the insurance company which issued the policies (R. 25), and that the statute and the holding of the Court of Appeals sustaining jurisdiction of the State

of New York are therefore repugnant to the Fourteenth Amendment in taking the plaintiffs' property without due process of law, and subject and expose them to full liability under the same policies to the State of New York and to the State having jurisdiction (R. 30-1), or to policyholders who sue upon the policies in any State (R. 27-8). This claim is based upon the fact that the State of incorporation of each insurance company is the only known factor upon which situs and jurisdiction could properly be based, in addition to which it is concededly the place where the policies are payable by their terms (R. 13), where the funds with which to pay are located (R. 12), where all claims must be filed (R. 11), where premiums are payable (R. 11), where all applications for insurance are considered and where the policies are actually written (R. 11), where all checks, premium notices, etc., are issued (R. 11-12), where all policy loans are made (R. 11), and where the records and officers of the companies are located (R. 10-11).

It is impossible to fix situs or jurisdiction in the States in which the missing policyholders or beneficiaries or assignees may be domiciled because their domicile or whereabouts is unknown and undeterminable (R. 75). Nor could situs and jurisdiction be fixed in the State where the insured resided when the policies were issued many years ago (the test used in the statute) because this is also unknown and impossible to determine (R. 16, 26, 67), and the place of delivery (the test adopted by the New York courts to supplement the test of residence used in the statute) of these old policies is also unknown (R. 15), and neither test has any legal, logical or practical relevancy for the purpose of escheat, which relates to the present location of the property, not to its origin. (For example: Abandoned automobiles and other chattels escheat to the State where they are found, not where they were originally purchased. Aban-

doned bank accounts escheat to the State where the bank is located and where the money is payable, regardless of where the depositor lived. Funds deposited in courts escheat to the State where the court is located irrespective of where the funds came from. Authorities are cited later.)

The Federal constitutional questions sought to be reviewed were originally raised in the plaintiffs' complaint in the court of first instance, the Supreme Court of the State of New York, New York County, in which it was specifically alleged that "the statute is unconstitutional and void as to foreign life insurance companies, under the Constitutions of the United States and of the State of New York" (references to the latter being omitted here) "and the following provisions thereof: * * * 14th Amendment (* * * 'Nor shall any State deprive any person of * * * property, without due process of law * * *.') * * * Art. I, Sec. 10, ('No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *')" (R. 24), and said complaint states the reasons why the statute is repugnant to said provisions of the Constitution (R. 9-33), such reasons in so far as material here being mentioned in the preceding paragraphs of this statement. The Court rejected these contentions and sustained the validity of the statute in an opinion by Mr. Justice Gavagan reported at 187 Misc. (N. Y.) 1004, and dated September 30, 1946, a copy of which is Exhibit B annexed hereto, and by a judgment dated October 24, 1946 (R. 4-6).

Judge Gavagan's opinion, in so far as material here, held that the policies represented matured debts and that the insurance companies must pay to the State even though no proofs of death or other event had been furnished, and even though no one knows what sum, if anything, might ever actually become due under the terms of the policies. He left undecided the question of whether the statute could

deprive the companies of possible defenses, but this was later decided by the Court of Appeals in a manner which will be described later. He declared the statute unconstitutional as to policies delivered in other States (R. 71, 5).

His opinion also held that although the situs of any sums owing under these policies would be at the domiciles of the insurance companies, and although the domicile of a corporation is the State in which it is incorporated, nevertheless he held that as to policies delivered (the statute does not even mention delivery) in the State of New York the companies should be considered domiciled in New York, and concluded that New York had jurisdiction to escheat (R. 73, 76), if the policy had been delivered in New York, although many years ago, and if it had insured the life of a person who had been a resident of New York when the policy was delivered (R. 73, 76), disregarding the impossibility of determining the place of residence or of delivery (R. 15-6, 26, 67). As will be shown later, the Court of Appeals reached the same result as to jurisdiction, but upon a different theory.

An appeal from said judgment of October 24, 1946, was duly taken by the plaintiff insurance companies to the Appellate Division of the Supreme Court of the State of New York by notice of appeal dated October 25, 1946, and the same Federal constitutional questions were raised by the complaint and by the briefs and argument of the appellants, such being the only method by which such questions could be raised in said court, there being no provision in the law or practice of the State of New York requiring or permitting the filing of exceptions, assignments of error, or the like upon such an appeal. The case was duly heard and argued in the Appellate Division which unanimously affirmed the judgment of October 24, 1946, by an order of affirmance dated March 14, 1947 (R. 85-86). No opinion

was delivered upon this decision which is reported at 271 App. Div. (N. Y.) 1002. A judgment of affirmance dated March 19, 1947, was thereafter duly made by said Supreme Court, New York County, upon the order of affirmance of the Appellate Division (R. 86-87).

Thereafter the plaintiffs duly appealed to the Court of Appeals of the State of New York, the highest court of said State in which a decision in the suit could be had, and the same Federal constitutional questions were raised by said complaint and by the briefs and argument of the appellants, such being the only method by which such questions could be raised in said court under the law or practice of the State of New York which contain no provisions requiring or permitting the filing of exceptions, or assignments of error, or the like upon such an appeal, which was duly taken by notice of appeal dated March 19, 1947 (R. 84). The case was duly heard and argued in the Court of Appeals, which on July 2, 1947, by a judgment, a copy of which is Exhibit C annexed hereto, modified and, as modified, affirmed the judgment below. At the same time said Court of Appeals rendered its unanimous opinion written by Chief Judge Loughran, a copy of which is Exhibit D annexed hereto, reported at 297 N. Y. 1.

The only modification made by the Court of Appeals was to state that the insurance companies may assert any defenses to the escheat except "non-compliance with policy provisions calling for due proof of death or of other designated contingency" (Exhibit D, page 59) and other exceptions not material upon this appeal, but the opinion adds, "Maybe, as the companies say, they cannot effectually prepare possible defenses without a proof of claim, but inconvenience of that kind does not nullify the statute" (Exhibit D, page 59). It is not a question of inconvenience but of impossibility (R. 23). The result is that the plaintiffs are

actually and effectively deprived of all defenses, and compelled to pay the State of New York even though concededly the conditions of the policy have not been fulfilled and no one can possibly know whether the insured is living or dead, or, if dead, when he died or where or how death occurred, etc., or how much, if anything, might ever become justly due under the policy.

The judgment and opinion of the Court of Appeals sustains the jurisdiction of the State of New York to escheat upon the theory that the contracts were "created through acts done in this State under the protection of its laws and the ties thereby established between the companies and the State were without more sufficient to validate the jurisdiction here asserted by the Legislature" (Exhibit D, page 58).

The judgment of the Court of Appeals specifically holds that the statute is valid and not repugnant to the Constitution of the United States or to Article I, Sec. 10 thereof or to the Fourteenth Amendment thereto (Exhibit D, pages 57, 59).

The judgment of the Court of Appeals is a final judgment in the case and leaves nothing to be done by the lower court except the ministerial act of entering an order upon the remittitur in accordance with the judgment of the Court of Appeals (New York Civil Practice Act, Sec 607-a), and therefore said judgment of the Court of Appeals is reviewable by the Supreme Court of the United States as a final judgment (*Department of Banking of Nebraska* v. *Pink*, 317 U. S. 264). Such an order, making the judgment of the Court of Appeals the judgment of the said Supreme Court, New York County, was duly made by the latter on July 24, 1947.

From the foregoing it is clear that in this case there is drawn in question the validity of a statute of the State of New York on the ground of its being repugnant to the Con-

stitution or laws of the United States and that the final judgment here sought to be reviewed of the Court of Appeals, that being the highest court of said State in which a decision in this case could be had, is in favor of the validity of said statute. It further appears from the foregoing that such validity of the statute was first drawn in question by the plaintiffs-appellants in their complaint served at the commencement of this action and has thereafter been drawn in question at each subsequent stage of the proceedings in this case. Accordingly it is clear that under the provisions of Section 237(a) of the Judicial Code, 28 U. S. C. 344(a), the Supreme Court of the United States has jurisdiction to review upon appeal the final judgment of the Court of Appeals.

The cases believed to sustain jurisdiction are as follows:

Lynch v. *U. S.*, 292 U. S. 571, 579-580.
Home Ins. Co. v. *Dick*, 281 U. S. 397, 408.
Boswell v. *Security Mutual Life Ins. Co.*, 193 N. Y. 465.
Sturges v. *Crowninshield*, 4 Wheat. 122, 197.
Bank of Minden v. *Clement*, 256 U. S. 126.
People v. *The Security Life*, 78 N. Y. 114.
Uhlman v. *New York Life*, 109 N. Y. 421.
Pennoyer v. *Neff*, 95 U. S. 714, 733.
Aetna Life Ins. Co. v. *Haworth*, 300 U. S. 227.
Columbia System v. *U. S.*, 316 U. S. 407, 417-8.
Anderson National Bank v. *Luckett*, 321 U. S. 233.
Security Bank v. *California*, 263 U. S. 282.
U. S. v. *Klein*, 303 U. S. 276.

V

The questions involved have never been presented to or passed upon by the Supreme Court of the United States, or any other Federal or State Courts prior to this case. They are substantial and important.

A

The first question is whether conditional contracts such as these life insurance policies are susceptible to escheat where concededly the terms and conditions precedent to liability, and to the amount of liability, have not been performed. Can the State statute declare the policies payable contrary to their terms, and deprive the companies of all possible defenses, in order to effect an escheat?

Each of these policies provides that it is payable only upon due proof of death or of other event. No such proof has been furnished. Yet the statute insists upon payment. It seeks to escheat what does not exist.

No one knows whether the insureds are living or dead. Even if they are dead, there is no liability until due proof of death is furnished. *Bergholm* v. *Peoria Life Ins. Co.*, 284 U. S. 489, a typical case, holds (pages 491-2) that "the obligation of the company does not rest upon the existence of the disability; but it is the receipt by the company of *proof*" thereof "which is definitely made a condition precedent" and to force payment without such proof "would be to vary the plain terms of a contract in utter disregard of long settled principles." The same rule applies in New York (*O'Reilly* v. *Guardian Mutual*, 60 N. Y. 169; *Wachtel* v. *Equitable Life*, 266 N. Y. 345), and elsewhere.

The New York Court of Appeals disposes of this by merely calling these policies "matured." That begs the question, we think. If "matured" means due or payable, they are not matured. The conditions have not been performed. To nullify these conditions and escheat the supposed proceeds of the policies is repugnant to Article I, Sec. 10, and to the Fourteenth Amendment (*Lynch* v. *United States*, 292 U. S. 571; *Home Ins. Co.* v. *Dick*, 281 U. S. 397).

Another reason given by the Court of Appeals for dispensing with due proof of death is that the production of a

bankbook may not be essential to the escheat of an abandoned bank account, citing *Provident Inst. for Savings* v. *Malone*, 221 U. S. 660, which held that a by-law of a Massachusetts bank requiring the production of the passbook could be ignored by the Massachusetts Legislature without creating a Federal question. The real distinction is that a bank account is a recognized debt, but as to these policies there is no debt until the proofs are furnished because their conditions have not been performed.

State legislatures can not tamper with contractual obligations merely because they may consider the provisions less important than do the contracting parties, as held in *Green* v. *Biddle*, 8 Wheaton 1, 84, as follows:

> "The objection to a law, on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation."

The unconstitutionality of such legislation is demonstrated in *Boswell* v. *Security Mutual Life Ins. Co.*, 193 N. Y. 465, 473; *Sturges* v. *Crowninshield*, 4 Wheat. 122, 197; and many others. In the *Boswell* case the opinion states (p. 474) "In 2 Story on the Constitution (Sec. 1385) the learned author lays down the rule as follows: 'It is perfectly clear, that any law which enlarges, abridges or in any manner changes the intention of the parties, resulting from the stipulations in the contract, necessarily impairs it.'"

Each of these policies may be subject to many possible defenses. We say "possible" defenses because at present it is concededly impossible to determine which defenses may apply to which policies, and concededly this can only be

done when the due proofs required by the terms of the policies have been furnished to the insurance companies.

Some of these defenses are based upon the contract terms (described earlier in this statement) such as the condition that the policies are payable only upon due proof of death, etc., the requirement of good health when the policy was issued, and the provisions as to age, suicide, war and aviation clauses, etc. Others may arise from fraud, misrepresentation, impersonation, etc.

A defense is property, just as much as a right of action, and is equally protected by the Constitution. *Pritchard v. Norton*, 106 U. S. 124, 132, states the principle as follows:

> "Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away. A vested right to an existing defence is equally protected, saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract and are not based on equity and justice."

The Court of Appeals says that the statute does not take away these defenses except the defense that due proof has not been furnished, but that exception in effect destroys any other defenses. It does so by forcing a premature assertion of these defenses in the face of the conceded fact that it is impossible to ascertain which defenses, if any, may apply unless and until due proofs of death or other event have been furnished.

A defense is a right to resist a claim at the proper time. It is not the privilege of embarking upon a costly and concededly hopeless search for information about these missing policyholders in order to presently assert hypothetical defenses to hypothetical claims. The policies contain no such

obligation, and none was ever intended. On the contrary, the very purpose of requiring due proof of death was to enable the companies to learn where, how, and when the death occurred, whereupon further investigations could be made to determine what defenses might then exist. In *Aetna Life* v. *Moyer*, 113 F. 2d 974, 977, the Court said that the purpose of a policy provision "requiring due proof * * * is self-evident" and "is designed to give the insurer reasonable opportunity to investigate and test the validity of the claim."

It should also be noted that the statute and its interpretation by the Court of Appeals also deprives the plaintiffs of all right and opportunity to consider and investigate claims, and to reject or resist unjust or fraudulent claims, or to adjust doubtful claims; and virtually liquidates and takes over this part of the plaintiffs' business and assets, in which concededly they have the beneficial ownership, no trust funds being involved and nothing being ear-marked or held for any particular policy; and deprives them of their right to conduct their business as authorized by their charters granted by the States in which they are incorporated. It is claimed that no sound reason has been given by any of the New York Courts for depriving the plaintiffs of these rights, which appear to be brushed aside upon the theory that the policies represent ordinary debts like bank accounts, which is claimed to be contrary to the conceded facts and entirely unsupported by the record.

It is contended that such an attempt, by direction and indirection, to impair the obligations of the contracts and to take the companies' property without due process is repugnant to Article I, Sec. 10, and to the Fourteenth Amendment.

Neither the Supreme Court of the United States, nor any other Court, prior to this decision has ever held that the

doctrine of escheat could apply to unperformed insurance policies or to any other unperformed conditional contracts, as distinguished from recognized debts such as bank accounts where a definite sum is payable unconditionally upon mere demand (*Anderson National Bank* v. *Luckett*, 321 U. S. 233; *Security Bank* v. *California*, 263 U. S. 282), and funds deposited in Courts as conceded debts payable to unknown persons (*U. S.* v. *Klein*, 303 U. S. 276, also cited at 106 F. 2d 213, cert. denied, 308 U. S. 618).

This statutory attempt to extend the doctrine of escheat to conditional contracts such as life insurance is fraught with grave danger. In the field of insurance alone one might well ask why it could not be extended to fire, automobile, fidelity and other types of insurance on the theory that if a loss occurred some arbitrary or estimated sum should escheat to the State if not claimed by the policyholder. In other fields, all types of conditional or contingent liabilities could be subjected to escheat on some estimated basis. There is no real distinction between these and life insurance. Insurance is not analogous to a bank account except perhaps in the popular conception which seems to have influenced the Legislature in attempting to deal with these policies as ordinary debts, forgetting their highly conditional nature both as to liability and as to amount of liability.

B

The second question is whether the State of New York has jurisdiction to escheat even if these policies are "matured" as asserted by the Court of Appeals.

The statute originally applied to policies issued by New York companies, but the amendment which caused the present litigation extended the statute to companies incorporated in other States (R. 47). New York is the only State which attempts to take jurisdiction of policies issued

by foreign companies, such as the plaintiffs. Similar statutes in other States are limited to policies issued by domestic corporations (Massachusetts, Gen. Laws, Ch. 175, as amended by Ch. 455, of the Laws of 1946; New Jersey, Laws of 1946, Ch. 154; Pennsylvania, Title 27, Ch. 6, Secs. 434-447).

New York claims jurisdiction to escheat if the policies were delivered in New York upon the lives of persons who were residents of New York when the policies were delivered. The other States claim jurisdiction if the insurance companies which issued the policies are domestic corporations. Here is a jurisdictional conflict which can only be authoritatively resolved by the Supreme Court of the United States. Unless it is resolved, the insurance companies must pay the full proceeds of many policies to two States, one claiming jurisdiction based on the place of delivery, the other basing jurisdiction upon the place of incorporation of the insurance company. Also, if New York lacks jurisdiction payment to the State will be no defense to suits by the policyholders in any State.

The same property can only escheat to one State, and the appellants contend that the State of incorporation (the domicile) of the insurance companies is the proper jurisdiction (if these policies are subject to escheat at all). A taking of property without jurisdiction is a taking without due process of law (*Pennoyer* v. *Neff*, 95 U. S. 714).

The reasons why the State of incorporation of the companies is the only proper and practical jurisdiction have been outlined earlier in this statement. Briefly, the reasons are that it is the only known factor upon which situs and jurisdiction could be based, the domiciles of the missing policyholders or beneficiaries being concededly unknown; it is the place where the policies are payable by their terms, and where the assets behind the policies are located, and

where all claims and other transactions in connection with the policies must be made under the terms thereof; and not least perhaps is the fact that the policyholder selected a company in a foreign jurisdiction and sent his money there. If a person sends his money to a bank in a foreign State no one would question the right of that State to take jurisdiction for the purpose of escheat.

Escheat is a reverting of title to the sovereign within whose domain the property is situated. It matters not where the property originated. It is not related to local regulation or taxation of foreign corporations, or to jurisdiction for the purpose of remedies such as attachment or service by publication. In the case of an abandoned corporate debt the State of incorporation has primary jurisdiction over the debtor and over "the mass of property" which stands behind the debt (*Anderson National Bank* v. *Luckett*, 321 U. S. 233). It is true that in a sense practically all the forty-eight States have jurisdiction over these foreign insurance companies for some purposes, but concededly it would be chaos to have each policy escheat to every State. Therefore, we must look to the primary jurisdiction of the State of incorporation. There and only there is a situs which satisfies not only the theory of sovereignty but also the concept that, in a union of many sovereign States, situs and jurisdiction should be based upon common sense and justice under the particular circumstances, as stated in *Severnoe Securities* v. *L. & L. Ins. Co.*, 255 N. Y. 120 (1931), in which Judge Cardozo analyzed the situs of debts as follows:

> (page 123) "* * * The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. The locality selected is for some purposes, the domicile of the creditor" (but in the case at bar this is concededly unknown) "for others, the domicile or

> place of business of the debtor * * *" (the State of incorporation of the insurance company is always known) "for others, any place where the debtor can be found" (the insurance companies do business in practically every State and property can escheat to only one State). "At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions * * *."

Applying this rule we find that the State of incorporation of the insurance company is the only practical and logical jurisdiction, and it is in harmony with the legislation of all other States which have thus far attempted to apply the principle of escheat to such policies.

This reasoning is in accord with the decisions of the Supreme Court of the United States in the cases holding that abandoned bank accounts escheat to the State in which the bank is situated, where the account was payable (*Anderson National Bank* v. *Luckett*, 321 U. S. 233; *Security Bank* v. *California*, 263 U. S. 282). No State has ever attempted to escheat accounts in banks incorporated in other States. It is also in accord with the rule that funds on deposit in a Federal Court escheat to the State in which the Federal Court is located, since the fund is deemed to be within the State and is payable there (*U. S.* v. *Klein*, 303 U. S. 276, also cited at 106 F. 2d 213, cert. denied 308 U. S. 618). No State has ever attempted to escheat funds on deposit in a court located in another State.

The cases cited involved recognized debts payable to someone. They all hold that the State in which the debtor corporation is domiciled (*i.e.*, incorporated) is the proper jurisdiction for escheat. None of these cases involve conditional contracts such as these insurance policies, where

nothing is payable until the conditions are performed and where the amount payable, if anything, is entirely unknown to anyone at the present time.

The New York Legislature apparently realized the unconstitutionality of the statute and promptly passed a bill to repeal it as to foreign life insurance companies (Assembly Introductory No. 2268, Print No. 2551, March 23, 1945), which was vetoed by the Governor on April 16, 1945, because the domestic insurance companies objected to other provisions of the bill.

Conclusion

It is respectfully submitted that the statute referred to herein is unconstitutional in that it is repugnant to Article I, Sec. 10, by impairing the obligations of the contracts issued by the plaintiffs, and also is repugnant to the Fourteenth Amendment by taking plaintiffs' property without due process of law. Accordingly, the judgment of the Court of Appeals of the State of New York, dated July 2, 1947, and now appealed from, should be reversed with directions to reverse the judgment of the Supreme Court of the State of New York, County of New York, dated October 24, 1946, and to reverse the order of affirmance of said judgment by the Appellate Division, First Department, of said Supreme Court dated March 14, 1947, and to reverse the judgment of affirmance dated March 19, 1947, entered in said Supreme Court, New York County, upon said order of affirmance, and said statute should be declared to be entirely void in its application to the appellants, foreign life insurance companies, and to the policies issued by them, in that it is repugnant to said provisions of the Constitution of the United States.

Dated: August 15, 1947.

GANSON J. BALDWIN,
Attorney for Appellants.

EXHIBIT A

Text of the Abandoned Property Law of the State of New York, as amended, insofar as it applies to life insurance companies, being Chapter 697 of the Laws of 1943, as amended by Chapters 497 and 498 (Sec. 2) of the Laws of 1944, also known as Chapter 1 of the Consolidated Laws of the State of New York.

Note:

In Sec. 103 the words in italics were added, and the words in brackets were deleted, by Chapter 498 (Sec. 2) of the Laws of 1944 thereby making the statute apply to foreign life insurance corporations.

In Secs. 700, 701, 702 and 703, the words in italics were added, and the words in brackets were deleted, by Chapter 497 of the Laws of 1944.

ARTICLE I—Short Title; Declaration of Policy; Definitions

§ 101. Short title.

This chapter shall be known and may be cited as the "Abandoned Property Law."

§ 102. Declaration of policy.

It is hereby declared to be the policy of the state, while protecting the interest of the owners thereof, to utilize escheated lands and unclaimed property for the benefit of all the people of the state, and this chapter shall be liberally construed to accomplish such purpose.

§ 103. Definitions.

. . . . . .

(d) "[Domestic] Life insurance corporation" means any [authorized] insurer corporation [incorporated and] organized under [any] *the* laws of this state [having power] *or any foreign corporation authorized* to do either one or

both kinds of insurance business authorized in paragraphs one and two of section forty-six of the insurance law, as amended from time to time.*

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*Note:

The Insurance Law, Sec. 46, paragraphs 1 and 2, read as follows:

1. "Life insurance," meaning every insurance upon the lives of human beings and every insurance appertaining thereto. The business of life insurance shall be deemed to include the granting of endowment benefits; additional benefits in the event of death by accident or accidental means; additional benefits operating to safeguard the contract from lapse, or to provide a special surrender value, in the event of total and permanent disability of the insured; and optional modes of settlement of proceeds.

2. "Annuities," meaning all agreements to make periodical payments where the making or continuance of all or of some of a series of such payments, or the amount of any such payment, is dependent upon the continuance of human life, except payments made under the authority of paragraph one.

ARTICLE VII—Unclaimed Life Insurance Funds

§ 700. Unclaimed [domestic] life insurance corporation moneys.

1. The following unclaimed property held or owing by [domestic] life insurance corporations shall be deemed abandoned property:

(a) Any moneys held or owing by any [domestic] life insurance corporation which shall have remained unclaimed for seven years by the person or persons appearing to be entitled thereto under matured life insurance policies on the endowment plan issued on the lives of residents of this state.

(b) Any moneys held or owing by any [domestic] life insurance corporation which are payable under other kinds of life insurance policies issued on the lives of residents

of this state where the insured, if living, would, prior to the thirty-first day of December next preceding the report required by section seven hundred one, have attained the limiting age under the mortality table on which the reserves are based, exclusive of

(i) any policy which has within seven years been assigned, readjusted, kept in force by payment of premium, reinstated or subjected to loan, or

(ii) any policy with respect to which such corporation has on file written evidence received within seven years that the person or persons apparently entitled to claim thereunder have knowledge thereof.

(c) Any moneys held or owing by any [domestic] life insurance corporation due to beneficiaries under policies issued on the lives of residents of this state who have died, which moneys shall have remained unclaimed by the person or persons entitled thereto for seven years.

2. Any such abandoned property held or owing by a [domestic] life insurance corporation to which the right to receive the same is established to the satisfaction of such corporation shall cease to be deemed abandoned.

§ 701. Annual report of abandoned property.

1. On or before the first day of April in each year every [domestic] life insurance corporation shall make a verified written report to the state comptroller, which shall contain a true and accurate statement, as of the first day of January next preceding, of all abandoned property specified in section seven hundred, held or owing by it.

2. Such report shall set forth:

(a) The name and last known address of any person or persons appearing from the records of such [domestic] life insurance corporation to be entitled to receive any such abandoned property;

(b) The amount appearing from the records of such corporation to be due;

(c) The policy number and policy age of the insured;

(d) The date such abandoned property was payable;

(e) The names and last known addresses of each beneficiary appearing in the records of the insurer; and

(f) Such other identifying information as the state comptroller may require.

3. Such report shall be in such form and the abandoned property listed shall be classified in such manner as the state comptroller may prescribe. Names of persons appearing to be entitled to such property or of beneficiaries appearing in such report shall be listed in alphabetical order within each such classification.

4. In case any [domestic] life insurance corporation shall on the first day of January in any year neither hold nor owe any abandoned property specified in section seven hundred, it shall on or before the first day of April next succeeding make a verified written report to the state comptroller so stating.

§ 702. Publication of list of abandoned property.

1. Within thirty days after making a report of abandoned property pursuant to the provisions of section seven hundred one, such life insurance corporation shall cause to be published a notice entitled: "Notice of names of persons appearing as owners of certain unclaimed property held by (name of life insurance corporation)."

2. Such notice shall be published once [in two newspapers published in the city or village] *a week for two successive weeks in a newspaper published in the county of the state* in which is ~~located~~ the last-known address of the holder of a policy under which such abandoned property is payable. [; provided, however, that if such address is in the city of New York, such publication shall be in two newspapers published in the county where such address is located. If there is only one newspaper published in any such city or village, such notice shall be published in such newspaper and in a newspaper published in the county where such

address is located. If there are no newspapers published in such city or village, then such publication shall be in two newspapers published in the county where such address is located, or, if there is only one such newspaper published in such county, then in such newspaper, or, if there are no newspapers published in such county, then in a newspaper published in an adjacent county. All newspapers in which such notice shall be published shall be newspapers printed in the English language.] *If there are no newspapers published in such county then such notice shall be published in a newspaper published in an adjacent county. If such last-known address is outside of the state of New York, such publication shall be in such newspaper published in this state as may be designated by the state comptroller. Such notices shall be published in newspapers printed in the English language.*

3. Such notice shall, in accordance with the classification prescribed by the state comptroller for the report pursuant to the provisions of section seven hundred one, set forth:

(a) the names and last known addresses which were in such report, of all persons appearing to be entitled to any such abandoned property amounting to ten dollars or more. Such names shall be listed in alphabetical order. [If, however, such life insurance corporation has reported abandoned property payable on policies whose holders' last known addresses are in more than one city or village or, in the case of New York city, more than one county, the names shall be listed alphabetically for each such city, village or county and such notice shall include only the names of the persons appearing to be entitled to abandoned property payable on policies whose holders' last known addresses are in such city, village or county;]

(b) such other information as the state comptroller may require; and

(c) a statement

(i) that a report of unclaimed amounts of moneys held or owing by it has been made to the state comptroller and that a list of the names of the person or

persons appearing from the records of such life insurance corporation to be entitled thereto is on file and open to public inspection at its principal office or place of business in any city, village or county where any such abandoned property is payable;

(ii) that such unclaimed moneys will be paid by it on or before the succeeding thirty-first day of August to persons establishing to its satisfaction their right to receive the same; and

(iii) that in the succeeding month of September, and on or before the tenth day thereof, such unclaimed moneys still remaining will be paid to the state comptroller and that it shall there upon cease to be liable therefor.

4. Such life insurance corporation shall file with the state comptroller on or before the tenth day of May in each year proof by affidavit of such publication.

§ 703. Payment of abandoned property.

1. In such succeeding month of September, and on or before the succeeding tenth day thereof, every such [domestic] life insurance corporation shall pay to the state comptroller all abandoned property specified in such report, excepting such abandoned property as since the date of such report shall have ceased to be abandoned.

2. Such payment shall be accompanied by a statement setting forth such information as the state comptroller may require relative to such abandoned property as shall have ceased to be abandoned.

§ 704. Life insurance departments of savings and insurance banks.

(Note: Not pertinent.)

§ 705. Unclaimed property held by superintendent of insurance after liquidation.

(Note: Not pertinent.)

§ 706. Payment of abandoned property after liquidation by superintendent of insurance.

(Note: Not pertinent.)

Note: Subsequent to the commencement of the action, the following section was added by Ch. 452 of the Laws of 1946, approved April 4, 1946:

Sec. 707. Reimbursement for claims paid by insurers. Any life insurance corporation which has paid to the state comptroller moneys deemed abandoned property pursuant to the provisions of this article may make payment to any person entitled to all or any part thereof and shall thereby acquire all of the rights of such person to payment by the state comptroller.

ARTICLE XIV—General Provisions

§ 1400. Statutes of limitations not a bar.

The expiration of any period of time specified by law, during which an action or proceeding may be commenced or enforced to secure payment of a claim for money or recovery of property, shall not prevent any such money or property from being deemed abandoned property, nor affect any duty to file a report required by this chapter or to pay or deliver to the state comptroller any such abandoned property; and shall not serve as a defense in any action or proceeding by or on behalf of the state comptroller to compel the filing of any report or the payment or delivery of any abandoned property required by this chapter or to enforce or collect any penalty provided by this chapter.

§1404. Assumption of liability by the state.

1. The care and custody • • •

(i) • • • of all abandoned property paid to the state comptroller pursuant to this chapter, is hereby assumed for the benefit of those entitled to receive the

same, and the state shall hold itself responsible for the payment of all claims established thereto pursuant to law, less any lawful deductions, which cannot be paid from the abandoned property fund.

• • •

2. Any person, copartnership, unincorporated association or corporation making a payment of abandoned property to the comptroller shall immediately and thereafter be relieved and held harmless from any or all liability for any claim or claims which exist at such time with reference to such abandoned property or which may thereafter be made or may come into existence on account of or in respect of any such abandoned property.

3. No action shall be maintained against any person, copartnership, unincorporated association or corporation, or any officer thereof, for

(a) the recovery of abandoned property paid to the state comptroller pursuant to this chapter or for interest thereon subsequent to the date of the report of such abandoned property to the state comptroller pursuant to this chapter; • • • or

(c) damages alleged to have resulted from any such payment.

§1405. Interest not to run after report of abandoned property.

Notwithstanding any other provision of law, no owner of abandoned property shall be entitled to receive interest on account of such abandoned property from and after the date a report of such abandoned property is made to the state comptroller pursuant to this chapter, whether or not he was entitled to interest on such property prior to such date. No claimant to abandoned property heretofore paid to the state comptroller shall be entitled to receive interest on account of such property, whether or not he was entitled to interest on such property prior to such payment.

§1406. Claims for abandoned property heretofore or hereafter paid to the state.

1. (a) Claim may be filed with the state comptroller for any abandoned property heretofore paid to the state or hereafter paid to the state comptroller pursuant to this chapter * * * (Note: Part omitted is not pertinent to life insurance.)

(b) The comptroller shall possess full and complete authority to determine all such claims and shall forthwith send written notice of such determination to the claimant. At any time within four months thereafter, such claimant may apply for a hearing and a redetermination of his claim. After an appropriate hearing on notice, before the comptroller or person duly designated by him, the comptroller shall make and serve his final determination, which alone shall be reviewable by application to the supreme court, Albany County, upon not less than ten days' notice to the comptroller.

(c) The comptroller, or any person duly designated by him, is empowered to take testimony and proofs, under oath, upon such hearing, and shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents pertinent to such hearings.

* * *

§1407. Payment by state comptroller.

Any claim which is allowed by the state comptroller or ordered to be paid by him by a court of competent jurisdiction pursuant to the provisions of section fourteen hundred six, together with such costs and disbursements as may be allowed by the court, shall be paid out of the abandoned property fund and the comptroller shall not be liable in any action for any claim paid by him in good faith. There shall be deducted by the state comptroller from any claim allowed or the amount, other than costs and disbursements allowed by the court, of any claim ordered to be paid by him by a court of competent jurisdiction, one per cent, but in no event less than three dollars, from any such payment as a service charge, and such amount shall remain in the abandoned property fund.

If during any session of the legislature there are insufficient moneys in the abandoned property fund to pay all claims which have been allowed by the state comptroller or ordered to be paid by him by a court of competent jurisdiction, the state comptroller shall so certify to the legislature, which shall appropriate from the general fund to the abandoned property fund* an amount sufficient to pay such claims.

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*Note:

Whenever the Abandoned Property Fund exceeds $750,000, the excess becomes the absolute property of the State of New York, under the State Finance Law of New York, Sec. 95.

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§1408. Verification.

Any report required to be verified by this chapter shall be verified, if made by a person by such person, if made by a partnership by one of the members thereof, if made by an unincorporated association or private corporation by the president or by a vice-president and one other principal officer thereof, and if made by a public corporation by the chief fiscal officer thereof.

§1409. Payment for publication.

Any amount paid by a person to a newspaper or newspapers for any publication of names as required by this chapter shall be charged prorata against all abandoned property held or owing by such person at the time of such publication, except abandoned property of individual amounts of less than ten dollars.

§1410. Designation of newspapers.

Any notice required by this chapter shall be published in such newspapers as shall be designated by the state comptroller, except that in no case shall a notice be published in a newspaper other than one specified in the section requiring such publication.

§1411. Waiver of publication.

The state comptroller may waive the publication of any notice required by this chapter, except a notice required by section fourteen hundred two, whenever in his opinion the cost of publishing such notice would be unreasonable in relation to the amount of abandoned property.

§1412. Penalty for failure to report or file.

Any person failing to make any report or to file any affidavit required by this chapter shall forfeit to the people of the state the sum of one hundred dollars for each day such report or affidavit shall be delayed or withheld, except that the state comptroller may extend the time for making any such report or filing any such affidavit and may waive the payment of any penalty or part thereof provided for by this section.

§1413. Penalty for fraudulent returns.

The making of a willful false oath in any report required under the provisions of this chapter shall be perjury and punishable as such according to law.

§1501. Constitutionality.

If any part, provision or section of this chapter, or the application of any such part, provision or section in any particular respect, shall be adjudged by any court of competent jurisdiction to be unconstitutional or ineffective in whole or in part, such judgment shall be confined in its operation to the particular provision or section or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect, impair or invalidate the remainder of such provisions or sections or their application in other respects; and to the extent that such provisions or sections are not unconstitutional or ineffective, they shall remain in full force and effect.

EXHIBIT B

SUPREME COURT, NEW YORK COUNTY, SPECIAL TERM, PART ONE

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, et al., Plaintiffs,

against

FRANK C. MOORE, Comptroller of the State of New York, Defendant

GAVAGAN, J.:

This motion by the Attorney General of the State of New York, for judgment on the pleadings dismissing the complaint, presents the question of the constitutionality of Article VII of the Abandoned Property Law in so far as it purports to apply to foreign life insurance companies licensed to do business in this state, as well as other constitutional questions affecting domestic as well as foreign life insurance companies.

The action is brought by five life insurance companies, incorporated in other states but doing business here pursuant to license, against the Comptroller of the State of New York. It seeks (1) a declaratory judgment that Article VII of the Abandoned Property Law is unconstitutional and void as to plaintiffs, and (2) an injunction against attempts by the Comptroller to enforce the statute against them.

The Abandoned Property Law provides for the turnover to the state of property unclaimed by the owners thereof for such a length of time as to justify a presumption of abandonment. A mode of procedure is set up whereby the state takes such property into its custody and utilizes the same or its proceeds for the benefit of all the people until claim is made by the true owners. The first attempt to bring life insurance policies within the statute was in 1939 (Chapter 923 of the Laws of 1939). The statute was ex-

pressly limited to domestic companies. An action was commenced by New York Life Insurance Company for judgment declaring the 1939 law unconstitutional. The suit was withdrawn, however, after the 1940 Legislature had amended the statute by restricting its application to policies "issued on the lives of residents of this state" (Ch. 602, L. 1940). In 1944 the statute was amended so as to apply also to foreign life insurance companies authorized to issue policies of life insurance or annuities under "paragraphs one and two of section forty-six of the insurance law" (Chap. 497, 498, L. 1944). In 1945 the Legislature passed a bill eliminating foreign companies from the scope of the statute. However the bill also made the statute applicable to all policies issued by domestic companies by removing the existing restriction to policies issued upon the lives of residents, adopted in 1940. The bill was vetoed by the Governor, perhaps because of this proposed extension of the statute to all policies issued by domestic companies.

Article VII of the Abandoned Property Law deals with "unclaimed life insurance funds. It consists of eight sections, numbered 700 to 707 inclusive. Section 700, defining what shall be deemed abandoned property, reads as follows:

"§700. Unclaimed Life Insurance Corporation Moneys

1. The following unclaimed property held or owing by life insurance corporations shall be deemed abandoned property:

(a) Any moneys held or owing by any life insurance corporation which shall have remained unclaimed for seven years by the person or persons appearing to be entitled thereto under matured life insurance policies on the endowment plan issued on the lives of residents of this state.

(b) Any moneys held or owing by any life insurance corporation which are payable under other kinds of life insurance policies issued on the lives of residents of this state where the insured, if living, would, prior to the thirty-first day of December next preceding the report required by section seven hundred one, have attained the limiting

age under the mortality table on which the reserves are based, exclusive of

(i) any policy which has within seven years been assigned, readjusted kept in force by payment of premium, reinstated or subjected to loan, or

(ii) any policy with respect to which such corporation has on file written evidence received within seven years that the person or persons apparently entitled to claim thereunder have knowledge thereof.

(c) Any moneys held or owing by any life insurance corporation due to beneficiaries under policies issued on the lives of residents of this state who have died, which moneys shall have remained unclaimed by the person or persons entitled thereto for seven years,

2. Any such abandoned property held or owing by a life insurance corporation to which the right to receive the same is established to the satisfaction of such corporation shall cease to be deemed abandoned.

Section 701 provides that on or before each April first every life insurance company shall make a report to the Comptroller of property deemed abandoned by virtue of the provisions of section 700. Section 702 requires each company, within thirty days after its report to the Comptroller, to publish a list of persons appearing to be the owners of unclaimed property held by the company. The list is to be accompanied by a statement that moneys unclaimed by the succeeding thirty-first day of August will be paid to the State Comptroller and that the company shall thereupon cease to be liable therefor. Section 703 directs each company to pay to the Comptroller, in September, all property listed in its annual report as abandoned, except such property as shall have ceased to be abandoned since the date of the report. Sections 704, 705 and 706 are immaterial here. Section 707, added by chapter 452 of the Laws of 1946, declares that "any life insurance corporation which has paid to the state comptroller moneys deemed abandoned property pursuant to the provisions of this article may

make payment to any person entitled to all or any part thereof and shall thereby acquire all of the rights of such person to payment by the state comptroller."

Article XIV of the Abandoned Property Law, entitled "General Provisions," contains a number of sections (1400 to 1413 inclusive) applicable to all the preceding articles, including Article VII. Section 1400 provides that the expiration of the statute of limitations applicable to actions or proceedings against the insurance companies shall not prevent the claims against the companies from being deemed abandoned and shall not be a defense in a proceeding by the Comptroller to compel the filing of a report or the payment of the abandoned property to him. Section 1401 obligates the Comptroller to keep a public record of the names and addresses of the persons appearing to be entitled to the abandoned property. Section 1402 requires the Comptroller to publish in October of each year a statement of the abandoned property delivered or paid over to him, with the names and last known addresses of the persons appearing to be entitled thereto, together with a statement that a claim for the property should be filed with the Comptroller and that a service charge of one per cent, but not less than $3, must be retained by the Comptroller in connection with each claim allowed or established. Section 1403 is not material here. Section 1404 declares that the care and custody of the abandoned property paid to the state is "hereby assumed for the benefit of those entitled to receive the same, and the state shall hold itself responsible for the payment of all claims established thereto pursuant to law, less any lawful deductions, which cannot be paid from the abandoned property fund." The section further relieves any company paying abandoned property to the Comptroller from all liability with reference to such property and provides that no action shall be maintained against such company for the recovery of the property or for damages alleged to have resulted from such payment. Section 1405 declares that no owner of abandoned property shall be entitled to receive interest after the date of the report of abandoned property to the Comptroller. Section 1406 provides for the filing of claims to abandoned property

with the Comptroller and vests in him full authority to determine claims, subject to the power of the Supreme Court to review his determination. Section 1407 requires the Comptroller to deduct from any allowed claim one per cent. thereof, but not less than $3, as a service charge. It also provides for additional appropriations by the legislature when necessary to keep the abandoned property fund sufficient to pay allowed claims. The remaining sections of Article XIV are unimportant for the purposes of this motion, except perhaps section 1412, which imposes a penalty of $100 upon any person failing to file a report required by the statute, for each day that the report is delayed or withheld.

For the purposes of the present motion the allegations of the complaint must be deemed true. That pleading alleges that plaintiffs are incorporated in states other than New York and "for a great many years have done business in most of the other States of the United States pursuant to licenses granted by such States." It further appears from the complaint that the business of plaintiffs is conducted from their Home Offices, located in the states of their incorporation, where their officers, records and securities are situated; that applications for policies are obtained by agents and sent to the Home Offices for consideration, and if approved, that the policies are written at the Home Offices and sent to the agents for delivery to the applicants. Premiums are payable at the Home Offices, or, if paid to agents, are forwarded to the Home Offices. Notices as to premiums coming due and as to policy loans, interest on policy loans, lapses, etc., are mailed from the Home Offices. Loans on policies are considered and made at the Home Offices, and loan checks are drawn at the Home Offices and mailed to the policyholders or to agents for delivery to policyholders. "Claims under policies must be made at the Home Offices, under the terms of the policies, which provide that upon receipt at the Home Office of 'due proof' of death, or other event, the company will pay, etc., and all claims are considered at the Home Offices, and, if allowed pursuant to the terms of the policies, are paid by checks drawn at the Home Offices."

The complaint further alleges that "policies issued by the companies upon the lives of persons who appeared to reside in this State frequently have been and are delivered in some other State, and the premiums paid in other States"; that "policies issued by the companies frequently have been and are applied for and obtained in another State by an employer, creditor, partner, husband, wife, parent, or other person, for his or her own benefit, upon the life of a person who appeared to reside in this State"; and that "every year thousands of persons holding policies issued by the companies, including vested beneficiaries and assignees, have changed their residences from one State to another, and they continue to do so."

In the light of these allegations, plaintiffs contend that the legislature of this state had no jurisdiction or power to direct a turnover to the state of "abandoned" claims upon insurance policies issued by them on the lives of New York residents. It is important to note that the statute, as it is worded, is not limited to policies issued or delivered in New York State, as part of the business which plaintiffs are licensed to do here. Article VII is directed at all "life insurance corporations," a term defined in section 103 as including "any foreign corporation authorized to do either or both kinds of insurance business authorized in paragraphs one and two of section forty-six of the insurance law as amended from time to time." Under this statute, any foreign company, authorized to do a life insurance or annuity business here, is obliged to turn over to the state the amounts of all "abandoned" insurance policies "on the lives of residents of this state." It matters not that the person on whose life the policy was written may never have had any interest in the proceeds of the policy (the policy may have been applied for by a creditor or relative of the insured). It is immaterial that the policy may have been applied for, written and delivered outside the State of New York. It is of no consequence that the policy may be payable outside the state or that the person entitled to payment, and whose failure to make claim is deemed an abandonment under the statute, may never have resided in the state. All that is necessary is that the policy insure the life of a New York resident.

It would seem to be obvious that the legislature of this state would be without jurisdiction or power to compel foreign insurance companies, *merely because they are licensed to do business here*, to turn over to the state the amounts of all unclaimed insurance policies, *wherever written and delivered, and wherever and to whomsoever payable*. Nor would restriction of the statute to policies on the lives of New York residents alter the legal situation, irrespective of the date used for determining the insured's residence, for the residence of the person whose life is insured is not the proper criterion, by itself, for determining the situs of a claim upon a policy. The policy may have been obtained on the application of someone other than the insured and it may be payable to someone other than the insured. As to policies resulting from business done outside the state and having no relation to the license to do business here, the state is without jurisdiction. In U. S. Mortgage & Trust Co *v.* Ruggles, 258 N. Y. 32, the Court of Appeals declared (p. 40): "The State may not constitutionally regulate or interfere with the acts of foreign corporations outside its limits nor with the liberty of parties to take out contracts of insurance whenever they desire and collect the proceeds thereof. * * * the New York statute * * * could reach only business transacted within the State." In Mutual Life Ins. Co. *v.* Cohen, 179 U. S. 262, the United States Supreme Court ruled that a New York statute, prohibiting the lapsing of policies for non-payment of premiums or interest unless a notice had been mailed prior to the due date, would be unconstitutional if it applied to policies issued in other states by foreign insurance companies. The court said (p. 269): "That the legislature of New York could not control companies not organized under its laws as to their business transacted in other States is too clear for argument." In Alaska Packers *v.* Industrial Accident Commission, 294 U. S. 532, the Supreme Court declared that (p. 540): "The due process clause denies to a state any power to restrict or control the obligation of contracts executed and to be performed without the State, as an attempt to exercise power over a subject matter not within its constitutional jurisdiction." In Home Ins. Co. *v.* Dick, 281 U. S. 397 the same court stated (p. 410) that

"It (the state) may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them."

The determination of the situs of intangibles depends on a "common sense appraisal of the requirements of justice and convenience" in the particular situation involved (Severnoe Securities Corp. *v.* L. & L. Ins. Co., 255 N. Y. 120, 123 [Cardozo, Ch. J.]): "The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. The locality selected is for some purposes, the domicile of the creditor, for others, the domicile or place of business of the debtor, the place, that is to say, where the obligation was created or was meant to be discharged, for others, any place where the debtor can be found. * * * at the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions." Applying this test to the case under consideration, we find that the criterion for determining situs contained in the Abandoned Property Law, viz., the residence of the insured, is not one which satisfies the requirements of justice and convenience. The primary domicile of the debtor (the state of incorporation of the insurance company), the domicile of the creditor (the person entitled to the proceeds of the policy), the place where the contract of insurance was made, the physical location of the policy itself, and the place where the contract embodied in the policy is to be performed,—these are all ignored in the statute presently under attack. That the selection of the residence of the insured as the sole criterion of situs for purposes of transferring to the state the amounts of all abandoned policy claims does not satisfy the requirements of justice and convenience must be too evident to need elaboration. States where the contracts of insurance were made, where the debtor insurance companies are incorporated, and/or where the persons entitled to the proceeds of the policies reside, certainly have better and stronger rights to assert jurisdiction over the abandoned policy claims. It is neither just nor convenient, as far as the debtors and creditors on the policies are concerned, for the State of New York to compel foreign insurers to turn over to it proceeds of policies of insurance which

have no connection whatsoever with the business done by them in New York and which bear no relationship whatever to this state, except for the residence of the persons on whose lives the policies were issued. As a practical matter, hardship would be likely to result to the foreign insurers if they were obliged to yield to New York as to such policies. Compliance with the New York statute might well subject such foreign companies to double liability, complete or partial. Other states with better rights to exercise jurisdiction may pass similar statutes, and it would be no defense to the companies, as against attempts to enforce those statutes, that they had complied with the laws of New York, whose claim to jurisdiction rested solely on the insured's residence there. Indeed, the complaint alleges that the States of Michigan, Pennsylvania and Kentucky have already enacted similar statutes and that the legislatures of other states are contemplating analogous legislation. Prior to the 1946 amendment, which added section 707 to the Abandoned Property Law, plaintiffs would also have been subject to the risk that persons entitled to the proceeds of the "abandoned" insurance policies might start suits in other states whose courts would refuse to recognize as valid the provision of section 1404 which purports to relieve an insurer making payment to the New York Comptroller from liability to anyone in respect of the abandoned property turned over to the Comptroller. The 1946 amendment gave the companies who had complied with the statute the right to acquire the claimants' rights against the state, by paying the claimants the amounts of their claims. Since a "service" charge of 1% (and not less than $3) must be deducted when a claim is paid by the state, the insurance companies, even if they went to the trouble of making payments to claimants from their own funds after they had already made equivalent payments to the Comptroller, would be obliged to suffer a loss of 1% of their second payment, as well as of all interest thereon to the time they received partial reimbursement from the state. It is, therefore, apparent that the amendment leaves the companies exposed to some risk of loss, and perhaps double liability, even if they comply with our statute.

Nearly all life insurance companies do business in many states, and many do business in almost every state. To al-

low every state in which they do business to claim the right to custody of the amount of every "abandoned" policy ever issued by them anywhere would result in chaos. Use of the residence of the insured as the determinant of jurisdiction would not be either logical or practical—not only because the insured's residence is immaterial under any recognized rule for ascertaining situs, but also for the reason that the residence of the insured is unknown to the insurer, in many instances at least (the complaint, which must be regarded as true on this motion, so alleges).

The authorities cited by the Attorney General as supporting the validity of the statute have no applicability to a legislative attempt to compel foreign corporations to turn over to the state unclaimed funds or property *which had their origin in business transacted outside the state.* In Anderson National Bank *v.* Luckett, 321 U. S. 233, the court held that the State of Kentucky had the right to compel the turnover to it of unclaimed bank deposits in a national bank *located in Kentucky* because (p. 241): "The deposits are debtor obligations of the bank, *incurred* and to be performed *in the state where the bank is located* and hence are subject to the state's dominion" as (p. 248) "a part of the mass of property within the state whose transfer and devolution is subject to state control." (Italics supplied.) In Security Bank *v.* California, 263 U. S. 282, in upholding a similar statute of California dealing with savings bank deposits, the court emphasized that (p. 283) "the bank is a California corporation and has its only place of business there," adding (p. 285): "The unclaimed deposits are debts due by a California corporation with its place of business there. * * * The debts arose out of contracts made and to be performed there. * * * The deposits are clearly intangible property within the state. Over this intangible property the state has the same dominion that it has over tangible property." In Provident Institution for Savings *v.* Malone, 221 U. S. 660, a Massachusetts savings bank attacked as unconstitutional a Massachusetts statute. As in the Anderson and Security Bank cases, *supra,* no question of a legislative attempt to exercise extra-territorial jurisdiction was presented. The situs of the claims of depositors against the Massachusetts savings bank was clearly in Massachusetts

where the deposits were made and payable. Brooklyn Borough Gas Co. *v.* Bennett, 154 Misc. 106, likewise involved no question of the right of a state to direct the turnover to it of property outside the state. The statute there involved related to deposits with public utility companies within the state and the action was brought by a domestic company. In holding the statute valid the court declared that (p. 114): "The jurisdiction of a State *over property within its borders* under circumstances indicating an abandonment by the owners has been repeatedly sustained" (italics supplied). In United States *v.* Klein, 303 U. S. 276, the statute dealt only with deposits in courts (p. 278, footnote) "in and for any district within this Commonwealth," and in a later phase of the same litigation (106 Fed. [2d] 213, certiorari denied, 308 U. S. 618) the court expressly stated (p. 215) that "in order to give jurisdiction to the state courts the *res* must have its situs within the territorial limits of the state."

That the "abandoned" property must be actually or constructively within the territorial limits of the state appears to be recognized by the Attorney General in Point I of this brief. He contends, however, that the domestic agencies of the foreign plaintiffs are to be treated as domestic corporations and that, therefore, "the situs of the debt or claim is in this State" (Point III, Attorney General's brief). The authorities cited do not support the proposition that a foreign corporation, licensed to do business in this state, is to be treated as a domestic corporation *in connection with business transacted outside the state and having no relation to its authority to do business here.* In Comey *v.* United Surety Company, 217 N. Y. 268, the holding was merely that a foreign corporation, licensed to engage in business in New York, and possessing a representative to receive service here, was not to be deemed absent from the state and could therefore avail itself of the statute of limitations as if it were a domestic company. Obviously this decision is not in point here. Although the court did say that "*for many purposes*" a foreign insurance company transacting business here "must be treated as a domestic insurance company and as domiciled in this state," it did not go so far as even to suggest that for the purpose of a taking over by the state

of abandoned claims *arising out of business transacted outside the state* the foreign corporate debtor was to be treated as domiciled in this state. In Morgan *v.* Mutual Benefit Life Ins. Co., 189 N. Y. 447, cited in the Comey opinion, *supra*, and also in the Attorney General's brief, the policy had been issued in New York, to a resident of New York, by a foreign life insurance company authorized to do business here. In an action brought by the legal representatives of a pledgee of the policy to establish an equitable lien thereon, it was held that service by publication upon non-resident children of the deceased insured was good because the action sought to enforce a lien upon a *res* within the state. In holding that the situs of the claim upon the policy was here, the court emphasized that *the contract of insurance was made in New York state* as part of the business which the company was licensed to transact here. In Martine *v.* The International Life Insurance Society of London, 53 N. Y. 339, the statement that foreign corporations doing business here "must be regarded as domiciled by the residence of its general agents and its local organization" was qualified by the preceding words "as to the business transacted here."

That the Attorney General recognizes that the statute is unconstitutional if applied to policies written outside the state seems evident from the fact that his brief contains a statement (p. 15) that the statute is not applicable "to policies written by a foreign branch of a foreign company, even though the policy be written on the life of a resident of this State." This statement does not, however, obviate passing upon the constitutionality of the statute, as applied to policies written outside the state, for two reasons. In the *first* place, there is nothing in the literal wording of the statute itself to indicate that it was intended to apply only to policies resulting from business done within the state. It does not follow that because the statute was restricted as to foreign companies, to those authorized to do business here, that its scope was intended to be limited to policies emanating from business done here by such companies. *Secondly*, and more important, the complaint alleges and it must be deemed true for the purposes of this motion to dismiss, that (paragraph 25L) the Comptroller is attempting to enforce the statute even where "a policy may have been delivered

in another State, and although a policy may have been applied for and obtained in another State." The Attorney General's brief does not dispute the claim that the Comptroller has been attempting to enforce the statute even as to policies having no relation to the companies' license to do business here, nor does it state that such efforts will cease. In the circumstances, plaintiffs are entitled to obtain a definite adjudication as to the validity of the statute and of the Comptroller's rights against them thereunder.

The Attorney General's contention, that plaintiffs are not aggrieved and cannot be heard to plead the alleged infringement of the constitutional rights of the insured or of beneficiaries under the policies, appears to overlook that, as previously pointed out, payment to the Comptroller might subject plaintiffs to double liability, complete or partial. If they make payment to the Comptroller in compliance with the statute they will never have another opportunity to raise the question. The words of Chief Justice Stone in Anderson v. Luckett, *supra*, are pertinent here (pp. 242-3): "But if the statute is deficient in its provisions for notice and opportunity for hearing so that the depositors would not be bound by any proceedings taken under it, the bank would be entitled to raise the question whether its obligations to the depositors would be discharged by payment of the deposits to the state."

The conclusion arrived at, that the statute is invalid in so far as it purports to apply to policies written outside of the state by foreign companies, does not, however necessarily require a holding that it is *entirely* void, i.e., even as to policies written in this state as part of the business which the foreign companies transact here pursuant to license. Thus in Mutual Life Ins. Co. of N. Y. v. Cohen, *supra*, a statute of New York that no life insurance company doing business in that state should have the power to declare forfeited or lapsed any policies thereafter issued or renewed, for nonpayment of premium or interest, unless a premium notice had been mailed as required by the statute, was held unconstitutional as to policies written by foreign companies outside the State of New York, but valid and enforceable as to policies written in New York by the domestic agencies of the foreign insurers. The statute in the cited case, like the

one here involved, purported to apply to all insurance written by any company doing business here, without containing any limitation to the insurance written here. That the unconstitutionality of the application of part of the Abandoned Property Law should not affect the validity of the statute in other respects is expressly provided for in section 1501 of that statute: "If any *part*, provision or section of this chapter, *or the application of any such part*, provision or section *in any particular respect*, shall be adjudged by any court of competent jurisdiction to be unconstitutional or ineffective *in whole or in part*, such judgment shall be confined in its operation to the particular provision or section or *application* directly involved in the controversy in which such judgment shall have been rendered and shall not affect, impair or invalidate the remainder of such provisions or sections or their *application* in other respects; and to the extent that such provisions or sections are not unconstitutional or ineffective, they shall remain in full force and effect." (Italics supplied)

It is necessary, therefore, to consider whether the Abandoned Property Law is constitutional in so far as it attempts to legislate with respect to claims on policies written by *domestic* branches or agencies of foreign life insurance companies *in this state* on the lives of residents of this state. As to such policies it would seem that the foreign companies ought to be treated as domiciled in this state. In Morgan v. Mutual Benefit Ins. Co., *supra*, the Court of Appeals said (p. 454): "As to such a claim the insurance company should be treated as a domestic insurance company and as domiciled in this state. * * * Whenever a question as to the situs of a similar claim against an insurance company doing business in a state pursuant to the statutes thereof has been directly involved in this court or in the Federal courts, and it has been sought to uphold the situs of the claim *in the state where the contract was made*, it has been sustained." (Italics supplied). In Martine v. The International Life Insurance Society of London, *supra*, the same court declared (p. 348): "*As to the business transacted here*, the company must be regarded as domiciled by the residence of its general agents and its local organization." (Italics supplied)

The statement in plaintiffs' brief that (p. 44) "Morgan v. Mutual Benefit Life * * * seems to have been overruled by Hanna v. Stedman, 230 N. Y. 326," may, perhaps, be true where the question to be determined is whether there is such a *res* within this state as would justify service by publication on a non-resident. [It is to be noted, however, that the holding in the *Hanna* case was merely that an action in equity for interpleader, in which no specific fund had been set aside, was an action *in personam* rather than an action *in rem*, while the action in the *Morgan* case was to declare and enforce a lien on a policy claim, and that the holdings may therefore not be necessarily inconsistent.] But the *Hanna* case can hardly be deemed authority for the proposition that the state where the contract of insurance was made is without jurisdiction to pass a statute such as the one here under consideration. The fact that the action of interpleader was held to be *in personam* rather than *in rem*, is no indication whatsoever that the court which decided the case would have held that New York State, where the main office of the insurance company was located, did not possess jurisdiction to compel a turnover to it of abandoned proceeds of the membership certificates. Indeed, the position of these very plaintiffs is that the situs of the amounts owing on the abandoned policies is "the State in which the insurance company is incorporated" (plaintiffs' brief, p. 19). As applied to the facts of the *Hanna* case, this would mean that this state would have had jurisdiction to escheat the proceeds of the membership certificates there involved had they been abandoned. The determination that an action of interpleader was not *in rem* and that the courts of this state had no jurisdiction without personal service within the state therefore has no bearing whatever on the question as to which state would have had power to take custody of the proceeds of the certificates had they been deemed abandoned for lack of claim.

As to policies *written or delivered in this state* by domestic agencies of foreign life insurance companies, the situation is, as heretofore pointed out, that the domicile of the debtor companies must be deemed to be in this state. In addition, the statute, by its terms, is applicable only to poli-

cies issued on the lives of New York residents. "A common sense appraisal of the requirements of justice and convenience in (the) particular conditions" (Severnoe Securities Corp. v. L. & L. Ins. Co., *supra*, p. 123) rules out the only other possible states, viz.: (1) the domiciles of those entitled to claim the proceeds of the policies, and (2) the states of incorporation of the foreign companies.

(1) The residences of those who might at any particular time be entitled to the proceeds of the policies (either as beneficiaries, assignees or otherwise), i.e., the creditors, are obviously scattered throughout the country and elsewhere, and, in the case of unclaimed funds, often, if not almost always, unknown to the insurance companies. It would, therefore, be impracticable, to say the least, to adopt the doctrine that the states of the residences of the creditors are the ones possessing jurisdiction to compel the debtor companies to turn over to them unclaimed funds. This was apparently recognized by the United States Supreme Court in Anderson National Bank v. Luckett, *supra*, for the jurisdiction of Kentucky was upheld although the depositor-creditors included non-residents of the state. The court went so far as to hold that the sheriff's posting of notice on the bulletin board of the county in which the property was located was sufficient notice to all depositors, considered in conjunction with the notice given by the passage of the statute and the taking over of the property by the state. Plaintiffs themselves oppose the use of the domiciles of those entitled to make claims on the policies as the criterion of situs, urging that (Plff's brief, p. 19) "the only practical situs for the purposes of such a statute would be the state in which the insurance company is incorporated, because that is known, whereas the domicile of the missing policyholder, or beneficiary, or assignee, is unknown".

(2) The only other possible criterion for determining situs is the state of incorporation of the foreign insurance company. Where the policy is written or delivered in New York by a domestic branch or agency of a foreign insurance company, there seems to be no justification for ascribing the situs of the claim to the main office of the company in another state. The fact that the policies may require

presentation of claims at the home offices, and that checks in payment are issued at the home offices, does not seem to be as potent or compelling a consideration, for the purposes of determining which state possesses jurisdiction, as the fact that the policies were written and/or delivered in New York by New York agencies of the companies and insured the lives of New York residents. The court accordingly holds that *as to such policies* the legislature of the State of New York had jurisdiction to direct the companies to turn over to its custody claims deemed to have been abandoned. It follows that compliance with the legislative mandate as to said policies will not expose the companies to the risk of double liability either as the result of suits brought by claimants or by reason of similar statutes of other states. Thus in Anderson National Bank v. Luckett, *supra*, the court said (p. 624): "Since the bank is a debtor to its depositor, it can interpose no due process of contract clause objection to payment of the claimed deposits to the state, *if the state is lawfully entitled to payment, for in that case* payment of the debt to the state, under the statute, relieves the bank of its liability to depositors". (Italics supplied.)

The other grounds upon which plaintiffs attack the statute as unconstitutional are equally available to domestic insurance companies. Since the 1940 amendment, which restricted the scope of the 1939 statute to policies issued by domestic companies on the lives of residents of this state, no domestic company has questioned the validity of the statute. The various contentions of the plaintiffs will be now considered *seriatim*.

It is urged that until due proofs have been filed with the companies of the occurrence of the contingencies which make the policies payable (such as death of the insured or expiration of the term of an endowment policy) the persons entitled to the benefits of the policies possess at most "inchoate or potential choses in action." Paragraph (a) of subdivision 1 of section 700 requires the turnover of unclaimed amounts of *matured* endowment policies and paragraph (c) makes like provision as to policies on the lives of residents *who have died*. Clearly, as to such policies, the failure to file formal proofs with the companies is no different in principle than the failure to produce savings bank books, the

production of which savings banks uniformly make a condition precedent of payment. Yet the United States Supreme Court has upheld the validity of statutes, similar to our Abandoned Property Law, which have been directed at savings banks (Provident Institution for Savings v. Malone, *supra*; Security Bank v. California, *supra*), notwithstanding the absence of any statutory requirement that the bank books be produced. The only other policies covered by the statute are those specified in paragraph (b), viz., where the insured, if living, would have reached the maximum age "of the Mortality Table" (this varies from about 96 to 100, according to the Table used). It would seem that as to the amounts of such policies there is ample basis for holding that the choses in action are no longer merely potential or inchoate, and for permitting a state to take over custody, not for itself, but for the benefit of the claimants if they should ever appear.

Plaintiffs further contend that they may possess all kinds of defenses to claims upon many of the policies and that it would be unconstitutional to deprive them of such defenses. The complaint fails, however, to state any facts showing the existence of any specific defense to any specific policy. *Certainly the fact that the companies may possess valid defenses to some of the policies does not render the statute unconstitutional, in so far as other policies are concerned to which there are no valid defenses.* It is probably true that the companies may possess certain defenses to some of the policies which it would be unconstitutional to take from them by compelling a turnover to the state of the amounts of the policies. The proper remedy of the companies in such situations is to refuse to turn over the amounts of such policies, and, if deemed advisable, to sue for declaratory judgments, alleging the appropriate facts in the complaint. It is to be noted that some defenses which the companies might be able to assert in suits brought against them on the policies may not be available to them as grounds for refusing to make a turnover to the state. Examples are defenses based on failure to file proofs of death, etc., and also, *perhaps*, defenses of the statute of limitations (see post).

Plaintiffs also argue that the statute in reality attempts to take from them their own property, since they possess no

fund or *res* specifically set aside for each policy. It is sufficient answer to observe that in the case of savings banks and national banks no specific fund or *res* is set aside for each depositor and yet similar statutes directed at such banks have been held constitutional by the highest court of the land (see *supra*) on the theory that a state may take into its custody choses in action presumed to have been abandoned.

The contention that the statute is invalid because it "attempts to substitute the State of New York as insurer under these policies, regardless of the rights and wishes of the insurance companies and their policyholders" (plaintiffs' brief, p. 21) and that the statute therefore impairs the obligations of contracts is inconsistent with the Supreme Court decisions upholding similar statutes as to national banks and savings banks. Even the fact that the statute in Provident Institution for Savings v. Malone, *supra*, provided for the state's paying a lower rate of interest than that payable by the plaintiff savings bank was held not to invalidate the enactment, the court declaring that it was not open to the bank to raise a question which only affected its depositors.

Plaintiffs make much of the fact that section 1400 of the Abandoned Property Law deprives them of the defense of the statute of limitations in cases where they would possess such defense in actions by claimants on the policies. Here again, the fact that as to some policies they might have a good defense based on the statute of limitations would not be ground for invalidating the Abandoned Property Law in respect of its application to cases where no such defense exists. Plaintiffs' proper remedy, to raise the question, is to allege the specific facts in suits for declaratory judgment confined to the specific policies as to which plaintiffs claim to have a good defense based on the statute of limitations. It is unnecessary, for the purposes of the present motion, to determine whether the Attorney General is correct in his contention (for which he cites Margiotti v. Cunningham, 337 Pa. 289; State v. Marshall & Illsley Bank, 291 N. W. Rep. 361; 30 C. J. S. [2d] 1170, and other authorities), that the statute of limitations does not extinguish the debt but only the creditor's remedy, and that, therefore,

escheat and similar statutes, which deal with the rights of the state, rather than those of the creditor, "are not rendered invalid by reason of the fact that the statute of limitations has run against the unknown depositor or person primarily entitled to the money or property." (30 C. J. S. [2d] 1170.)

The contention is also made by plaintiffs that the statute violates the provision of section 19 of Article III of the New York Constitution that "no claim against the State shall be audited, allowed or paid which, as between citizens of the State, would be barred by lapse of time." This provision obviously does not apply to the rights of claimants to funds taken into the state's *custody* for their benefit. The state under the statute does not take title to the abandoned funds. Furthermore, even if the claims were interpreted as being "against the State" within the meaning of the constitutional provision, the time would not commence to run in favor of the state until it obtained delivery of the funds. The purpose of the constitution is merely to assure that no longer statute of limitations will be enacted for claims against the state than those applicable to claims against citizens of the state.

Some mention is made in plaintiffs' brief of the expense of preparing reports and arranging advertising for which, it is claimed, the companies receive no compensation. No real point is made of this, however. Section 1409 provides that any amount paid to newspapers for any publication of names required by the statute shall be charged equally against all abandoned property held or owing at the time of the publication, except abandoned property of individual amounts of less than twenty-five dollars. The expense of preparing reports of abandoned claims, equally applicable to domestic and foreign corporations, is one which the state may impose without rendering the statute unconstitutional.

The claim made in the complaint that the statute constitutes an unreasonable burden upon interstate commerce has been withdrawn.

The motion for judgment on the pleadings dismissing the complaint is accordingly denied, in so far as the statute is claimed to be invalid as to policies written outside the state

by foreign branches of foreign insurance companies, and otherwise granted.

Dated, September 30th, 1946.

J. A. G.,
J. S. C.

EXHIBIT C

COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 2nd day of July in the year of our Lord one thousand nine hundred and forty-seven, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding. John Ludden, Clerk.

REMITTITUR—July 2, 1947

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY & ors.,
Appellants,

ag'st

FRANK C. MOORE, Comptroller of the State of New York,
Respondent

Be It Remembered, That on the 26th day of March in the year of our Lord one thousand nine hundred and forty-seven, The Connecticut Mutual Life Insurance Company and others, the appellants in this cause, came here unto the Court of Appeals, by Ganson J. Baldwin their attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Frank C. Moore, Comptroller of the State of New York, the respondent in said cause, afterwards appeared in said Court of Appeals by Nathaniel L. Goldstein, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Ganson J. Baldwin of counsel for the appellants, and by Mr. Abe Wagman of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgments herein be and the same hereby are modified in accordance with the opinion herein and, as so modified, affirmed with costs to the defendant State Comptroller.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgments be modified in accordance with the opinion herein and, as so modified, affirmed etc., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, etc.

(S.) JOHN LUDDEN,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,

Albany, July 2, 1947.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(S.) JOHN LUDDEN,
Clerk.

(Seal of the Court of Appeals.)

EXHIBIT D

COURT OF APPEALS

THE CONNECTICUT MUTUAL LIFE INSURANCE Co., et al.,
Plaintiffs-Appellants,

against

FRANK C. MOORE, Comptroller of the State of New York,
Defendant-Respondent

OPINION

LOUGHRAN, *Ch. J.:*

This case presents questions as to the validity of the New York Abandoned Property Law (Cons. Laws, Ch. 1) in its application to unclaimed life insurance funds.

The gist of the relevant operative sections of the statute is as follows. Abandoned property includes any moneys, held or owing by any life insurance company which have remained unclaimed for seven years by the person or persons entitled thereto under (1) matured life insurance policies on the endowment plan issued on the lives of residents of this State; (2) other kinds of life insurance policies issued on the lives of residents of this State, where the insured, if living, would have attained the limiting age under the mortality table on which the reserves are based; (3) life insurance policies issued on the lives of residents of this State who have died. (Sec. 700) On or before April first in each year, every life insurance corporation shall make a verified written report to the State Comptroller of all such abandoned property held or owing by it. (Sec. 701). Within thirty days thereafter such corporation shall publish a newspaper notice to the persons appearing to be entitled to any of such unclaimed moneys together with a statement (1) that a list of the names of such persons is on file and open to public inspection at the principal office of the corporation; (2) that payment of such unclaimed moneys will be made on or before the succeeding August thirty-first, to persons establishing their right thereto; and

(3) that in the succeeding September such unclaimed moneys still remaining will be paid to the State Comptroller, after which the insurance corporation shall cease to be liable therefor. (Sec. 702). Such payment shall be made to the State Comptroller at the time so fixed (Sec. 703). Thereupon the care and custody of such property shall pass to the State, the State shall be responsible for all claims established thereto pursuant to law less any lawful deductions, and the insurance corporation shall be relieved of liability for any such claim (Sec. 1404).* The State Comptroller shall publish annual statements of abandoned property received by him and not paid to claimants (Sec. 1402). Claims may be filed with him for such property and his determination thereof shall be subject to review in the courts (Sec. 1406). The statute shall be enforced notwithstanding the bar of any statute of limitations (Sec. 1400).

Whether these parts of the statute should be declared unconstitutional is the question for decision. The plaintiffs are a number of foreign life insurance companies that are licensed to do business in this State. The State Comptroller is the defendant. Upon motions made by all parties for a decision on the pleadings, Special Term annulled the Statute in so far as it pertains to policies of life insurance issued for delivery outside the State of New York, but upheld the challenged provisions in all other respects, except that the court put aside an issue as to the unlawful operation thereof upon defenses that life companies may have to claims upon their insurance contracts. From so much of the judgment of Special Term as denied relief prayed for by them, the plaintiff companies appealed to the Appellate Division, and, when a unanimous affirmance followed, they brought the case to this Court as of right on the basis of the constitutional questions that are directly involved. Since the defendant State Comptroller has at all times been content

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*Section 707, added by L. 1946, ch. 452, further provides:

"Any life insurance corporation which has paid to the state comptroller moneys deemed abandoned property pursuant to the provisions of this article may make payment to any person entitled to all or any part thereof and shall thereby acquire all of the rights of such person to payment by the state comptroller."

with the decision of Special Term, we are here concerned only with the effect of the statute upon presumptively abandoned proceeds of insurance policies issued upon the lives of residents of this State and delivered within its borders by companies doing business here, and what follows has reference to policies so issued and delivered and to no others.

Each of the plaintiff companies has its home office outside this State. By his motion for judgment on the pleadings, the defendant State Comptroller constructively admits the following allegations of the complaint: "The business of the plaintiffs, and other life insurance companies, is conducted from their Home Offices, where their officers, records, and securities are situated. Applications for policies are obtained by agents throughout the United States, and are sent to the Home Offices for consideration, and, if approved, the policies are written at the Home Offices and are sent to the agents for delivery to the applicant. Premiums are payable at the Home Offices, or, if paid to an agent, are forwarded to the Home Offices. Claims under policies must be made at the Home Offices, under the terms of the policies, which provide that upon receipt at the Home Office of 'due proof' of death, or other event, the company will pay, etc., and all claims are considered at the Home Offices, and, if allowed pursuant to the terms of the policies, are paid by checks drawn at the Home Offices." On the strength of the above circumstances, the plaintiff companies insist that their debtor obligations under the contracts in question are beyond the territorial reach of the power of the New York Legislature.

Other defects imputed to the statute by the companies may be summarized in this manner: it cancels provisions of insurance contracts whereby the proceeds become payable only upon filing of due proof of specified events, e.g., death, age, survival, and upon surrender of the policy; it takes away defenses to policies, e.g., misrepresentation and breach of conditions; if given retrospective effect, it will operate to revive claims which at the time of its enactment were barred by the statute of limitations. In the foregoing aspects, the statute, as the plaintiff companies see it, is not only repugnant to the due process clauses, but also

impairs the obligation of contracts, takes private property for public use without making just compensation therefor and runs foul of the fundamental demand for the equal protection of equal laws. (U. S. Const. Art. I Sec. 10 and 14th Amendment; N. Y. Const. Art. I, Secs. 6, 7a).

The reason of the statute is plain enough. Section 102 says: "It is hereby declared to be the policy of the state, while protecting the interest of the owners thereof, to utilize escheated lands and unclaimed property for the benefit of all the people of the state, and this chapter shall be liberally construed to accomplish such purpose." (See *Moufang* v. *State of New York*, 295 N. Y. 121, 127-128). In accordance with the object first so stated, the Legislature has substituted the State for the plaintiff companies as debtor upon the policies in question and at the same time has secured to the policy-creditors appropriate notice thereof with an opportunity to be heard and with the further right to resort to the courts should payment by the State be refused. Such a statutory scheme fulfills the procedural requirements of due process (*Anderson National Bank* v. *Luckett*, 321 U. S. 233).

In the case just cited—where approval was given to a like scheme for State administration of abandoned bank deposits remaining in a national bank within the State—the Court said: "The deposits are debtor obligations of the bank, incurred and to be performed in the state where the bank is located, and hence are subject to the state's dominion" (321 U. S. at p. 233). Here the circumstances relied upon as a justification for the exercise of State power are not essentially different. True, the policies in question were committed to writing at the home offices of the plaintiff companies in foreign states and were to be paid by checks mailed therefrom. But the policies were issued upon the lives of residents of this State and were delivered within its borders by corporations doing business therein. "Effectiveness of a policy (as the complaint says) usually depends upon its being 'delivered and the first premium paid during the lifetime and good health of the insured,' a provision which is usually contained in the policies or in the application for insurance, copies of which are attached to policies when issued and made a part thereof." Thus

the State of New York—where the policies were delivered and where presumably the first premiums were paid—was the place where the contracts in question were made. (*Northwestern Life Ins. Co.* v. *McCue*, 223 U. S. 234; *U. S. Mortgage & Trust Co.* v. *Ruggles*, 258 N. Y. 32, 38; Restatement of Conflict of Laws, Sec. 318). On the whole, then, it makes no difference where the policies were signed or where payment thereof was to be initiated. For the core of the debtor obligations of the plaintiff companies was created through acts done in this State under the protection of its laws and the ties thereby established between the companies and the State were without more sufficient to validate the jurisdiction here asserted by the Legislature. (See *Curry* v. *McCanless*, 307 U. S. 357; *Hoopeston Co.* v. *Cullen*, 318 U. S. 313; *International Shoe Company* v. *Washington*, 326 U. S. 310. Cf. *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408; *Harris* v. *Balk*, 198 U. S. 215; *Morris Plan Industrial Bank of New York* v. *Cunning*, 295 N. Y. 324; *Feinman* v. *Marks*, 294 N. Y. 367).

The contention that the statute unwarrantably rescinds contractual conditions precedent such as the requirements of surrender of policies and filing of due proof of death or other specified events was rejected by the Special Term on the authority of *Provident Institution for Savings* v. *Malone*, (221 U. S. 660),—a case which sustained a statute whereby banks were commanded to pay over unclaimed deposits to a State without production of pass-books as required by agreements of deposit. The cited case is quite in point. Besides, the present statute calls upon the plaintiff companies to surrender moneys to this State only after maturity of the policy obligations and at a time when the State, as the then legal representative of the parties entitled to such payment, may be regarded as making demand therefor in their behalf.

"If the statute is retroactive", says the plaintiff companies, "it illegally attempts to revive claims barred by the statute of limitation." On its face, the statute appears to have been meant for retrospective application, seeing that it became law on April 23, 1943, but did not take effect until June 1, 1944 (L. 1943 Vol. 1, pp. 1383 and 1415), and that the reports of abandoned property called for by section

701 must be made on or before the first day of April "in each year." Furthermore, the clearly procedural character of the statute is reason enough for giving it a retrospective application (*Shielcrawt* v. *Moffett*, 294 N. Y. 181, 188); and if abandoned claims are to be revived thereby, this will be no offense against constitutional law. (*Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 316; *Matter of New York University* (*Moore*), 296 N. Y. 913).

As has already been indicated, the court at Special Term did not decide whether or not the statute illegally deprives the plaintiff companies of defenses to claims upon their insurance contracts. We see no reason why that issue should go undetermined (Cf. *Quaker Oats Co.* v. *City of New York*, 295 N. Y. 527, 538). The plaintiff companies, as we have said, cannot resist payment to the defendant Comptroller because of (1) the statute of limitations or (2) non-compliance with policy provisions calling for due proof of death or of other designated contingency or (3) failure to surrender a policy. Except for these restrictions, however, the statute (Sec. 700) leaves any of the plaintiff companies wholly free to set up any complete or partial defense whereby it may establish that no moneys are "held or owing" by it on a particular policy, or that only some fraction of the face amount of the contract is payable thereon. Maybe, as the companies say, they cannot effectually prepare possible defenses without a proof of claim, but inconvenience of that kind does not nullify the statute. Accordingly paragraph 3 of the judgment of Special Term —which reserved decision on the question whether the statute wrongfully does away with defenses to policies— should be struck out.

As so modified, the judgments should be affirmed, with costs to the defendant State Comptroller.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 337

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, NATIONAL LIFE INSURANCE COMPANY, PENN MUTUAL LIFE INSURANCE COMPANY, and PHOENIX MUTUAL LIFE INSURANCE COMPANY (original Plaintiffs); and AETNA LIFE INSURANCE COMPANY, THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA, THE UNION MUTUAL LIFE INSURANCE COMPANY (Plaintiffs Added by Stipulation),

Appellants,

v.

FRANK C. MOORE, Comptroller of the State of New York,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

HANSON J. BALDWIN
72 Wall Street, New York
Attorney for Appellants

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The motion to affirm claims that the questions involved are not substantial in view of the decisions cited in the opinion of the New York Court of Appeals.

None of the cases cited by the Court of Appeals sustains its decision on the Federal questions involved in this appeal. On the contrary, some of them tend to sustain the appellants' claims.

The Federal questions involved have never been presented to or passed upon by the Supreme Court of the United States, or by any court, prior to this case. They are substantial and are important to all insurance com-

panies and to the States which have enacted or contemplate legislation attempting to escheat life insurance policies.

The statute involved is the Abandoned Property Law of the State of New York, particularly the provisions which attempt to escheat life insurance policies, including policies issued by the appellant companies which are incorporated in other States. The Assignment of Errors and the Jurisdictional Statement describe the statute and set forth the grounds upon which appellants claim that it is repugnant to the Constitution of the United States, Article I, Sec. 10, and the Fourteenth Amendment, in that it impairs the obligations of the contracts and takes the appellants' property without due process of law.

No cases are cited by the Court of Appeals to justify the statutory attempt to escheat conditional contracts such as life insurance policies where the conditions precedent to liability, and to the amount of liability, are concededly unperformed. The statute ignores the terms of the policies and demands payment in full even though the insured may still be living, or may have died under circumstances which would reduce or eliminate liability. All defenses based upon misstatement of age, death caused by suicide, war, aviation, fraud, etc., are in effect abolished by depriving the appellants of their contract right to receive due proof of death or other event as a condition precedent to liability. The statute also deprives the appellants of their right to receive, consider and investigate claims under the policies, and to reject or resist unjust claims, and to adjust doubtful claims.

Until recently no legislature has attempted to escheat life insurance policies or similar unperformed conditional contracts. Previously, escheat legislation was limited to real property, tangible personal property, and to liquidated debts such as abandoned bank accounts. The statute here, in order to have something to escheat, attempts to create debts contrary to the terms of the contracts.

The Court of Appeals cites *Anderson National Bank* v. *Luckett*, 321 U. S. 233, and *Provident Inst. for Savings* v. *Malone*, 221 U. S. 660, which held that abandoned bank accounts, which are liquidated debts payable upon mere demand, could escheat to the State where the bank was located and incorporated and where the account was payable. They do not hold or suggest that the doctrine of escheat can be applied to unperformed conditional contracts such as life insurance policies where nothing is held or owing and where it is impossible to know or determine what sum, if any, might be payable if the conditions were performed.

On the jurisdictional question, the *Anderson* and *Provident* cases tend to sustain the appellants' contentions that jurisdiction to escheat (if there were anything to escheat) would be in the State where the insurance company is incorporated, and where the policies are payable by their terms, and where the funds behind the policies are located. No State attempts to escheat accounts owing by banks located in other States. It would lack jurisdiction. If life insurance policies are to be treated as debts, the same rule logically applies. This is discussed more fully in the Jurisdictional Statement.

The jurisdictional cases cited by the Court of Appeals have no bearing upon escheat or upon jurisdiction for that purpose. We shall discuss them briefly.

Curry v. *McCanless*, 307 U. S. 357, holds that two States may impose death taxes under some circumstances. However, the same property cannot escheat to two States.

Hoopeston Co. v. *Cullen*, 318 U. S. 313, holds that if a reciprocal insurance association does business in a foreign State, it must comply with its licensing requirements and regulations. No possible analogy to escheat is to be found in that case.

International Shoe Co. v. *Washington*, 326 U. S. 310, and *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, hold that corporations may be subjected to unemployment and

premium taxes in any State where they are doing business. If this rule applied to escheat the appellants might be required to pay the full amount of each policy to nearly every State in the Union.

Harris v. *Balk*, 198 U. S. 215, *Morris Plan Bank* v. *Gunning*, 295 N. Y. 324, and *Feinman* v. *Marks*, 294 N. Y. 367, hold that a debt can be attached in any State where the debtor can be served with process. The first attachment reduces the debt *pro tanto* so that the debtor will not be exposed to multiple liability. The vigilant creditor takes precedence. To apply such a theory to escheat would be to say that the State which first enacts an escheat statute gets jurisdiction.

None of the other cases cited in the opinion below are relevant to the Federal questions raised by this appeal.

Respectfully submitted,

GANSON J. BALDWIN
Attorney for Appellants

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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 337

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, NATIONAL LIFE INSURANCE COMPANY, PENN MUTUAL LIFE INSURANCE COMPANY, and PHOENIX MUTUAL LIFE INSURANCE COMPANY (Original Plaintiffs); and AETNA LIFE INSURANCE COMPANY, THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA, and THE UNION MUTUAL LIFE INSURANCE COMPANY (Plaintiffs Added by Stipulation),

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APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANTS

GANSON J. BALDWIN
BUIST MURFEE ANDERSON
JOHN F. HANDY
Counsel for Appellants

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New York cannot, under the guise of escheat, take sums neither held, nor owing, nor payable under the terms of these policies, to the prejudice of the companies and all of their policyholders.

Alternative Objection 1

Even if any sums were due, New York lacks jurisdiction to escheat policies payable in foreign States by foreign companies.

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Statements Under the Rules

Opinions Below. The opinion of Mr. Justice Gavagan in the court of first instance, the New York Supreme Court, County of New York, is reported in 187 Misc. 1004. Upon appeal the Appellate Division, First Department, unanimously affirmed without opinion (271 App. Div. 1002). Upon further appeal the Court of Appeals modified and, as modified, unanimously affirmed with an opinion by Chief Judge Loughran reported in 297 N. Y. 1.

Jurisdictional Authority. Judicial Code § 237(a), 28 U. S. C. 344(a).

Statute Involved. The portion of the Abandoned Property Law of the State of New York (Chap. 1 of the Consolidated Laws of New York) applicable to life insurance companies, particularly Chapters 498 (Sec. 2) and 497 of the Laws of 1944 (pp. 1021-1025), and the statute which they amend, Chapter 697 of the Laws of 1943 (pp. 1383-1416, particularly Art. I, pp. 1384-1385, and Art. VII, pp. 1398-1401, and Arts. XIV and XV, pp. 1408-1415). The pertinent provisions are set forth in Appendix A (p. 35), and in the Record (R. 21-31), and are described in this brief at pages 5-7.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 337

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, NATIONAL LIFE INSURANCE COMPANY, PENN MUTUAL LIFE INSURANCE COMPANY, and PHOENIX MUTUAL LIFE INSURANCE COMPANY (Original Plaintiffs); and AETNA LIFE INSURANCE COMPANY, THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA, and THE UNION MUTUAL LIFE INSURANCE COMPANY (Plaintiffs Added by Stipulation),

Appellants,

v.

FRANK C. MOORE, Comptroller of the State of New York,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANTS

Primary Objection to Statute.

New York cannot, under the guise of escheat, take sums neither held, nor owing, nor payable under the terms of these policies, to the prejudice of the companies and all of their policyholders.

Alternative Objection.

Even if any sums were due, New York lacks jurisdiction to escheat policies payable in foreign States by foreign companies.

The conflict with Pennsylvania, which claims jurisdiction to escheat all abandoned policies issued by Pennsylvania companies, can only be settled by this Court.

STATEMENT OF THE CASE

The Abandoned Property Law of New York forces payment to the State, in the nature of an escheat, of so-called "abandoned" life insurance and endowment policies, even though nothing whatsoever is held, owing or payable under the terms of the policies.

It is a new type of escheat legislation. Its history is in Appendix B (p. 47). Its pertinent provisions are in Appendix A (p. 35). The vital provisions and the construction placed upon them by the New York Court of Appeals are described at pages 5-8.

Constitutional Objections.

Appellants claim that the statute, as construed below, is repugnant to Article I, Section 10, of the Constitution because it impairs the obligations of the contracts, and to the Fourteenth Amendment because it takes the appellants' property without due process of law (R. 15-21, 64, 68-72).

The Court of Appeals upheld the statute except as to policies issued for delivery outside of New York (R. 62-63, 2-3, 60).

Questions Involved.

The first question is whether New York can declare these policies payable contrary to their terms, and deprive the companies of all defenses and other rights thereunder, in order to create an escheatable debt.

If that is constitutional, the second question is whether jurisdiction to escheat is in New York or in the State of incorporation of the insurance company, or in some other State. The same policy cannot escheat twice. Yet that is the predicament caused by the jurisdictional conflict between the New York and Pennsylvania statutes.

These questions have never been presented to this Court, or any Court, prior to this case.

Facts Are Conceded.

The facts are stated in the Complaint and are conceded to be correct (R. 2). Both sides moved for judgment upon such conceded facts (R. 2).

The Parties.

The plaintiffs are life insurance companies chartered by various States, about 100 years ago in most instances. They do business and are subject to process in nearly every State (R. 5). They have outstanding millions of policies totalling billions of dollars of insurance issued throughout the United States (R. 5-6).

The defendant-appellee is the Comptroller of the State of New York, the official charged with the duty of administering and enforcing the statute (R. 4-5). He receives all sums payable under it (R. 5).

Terms of the Policies.

Proof of death, age, etc., required.

These policies provide that they are payable only upon receipt by the insurance company of due proof of death, age and (as to endowments) survival of the specified period (R. 6-7, 14, 17, 65). No such proof has been furnished (R. 14, 17, 52, 65).

Age misstatements reduce insurance.

These policies contain a provision that, if the age of the insured was understated, as it frequently is, the amount of insurance shall be reduced to the amount which the premium would have purchased at the correct age (R. 8). The correct age is not known and is impossible to determine unless and until due proofs are furnished as required by the terms of the policies (R. 7, 8, 14).

Death from suicide, military service, aviation, etc., eliminates or reduces liability.

The policies also contain clauses which may exclude or reduce liability in case of suicide (R. 8), or in case of death caused by war or military service (R. 8), or aviation (R. 9), or if the insured was not living and in good health when the policy was delivered and the first premium paid (R. 8). Since no one knows whether the insured is living or dead, or if dead, when or how he died, it is impossible to know or determine the amount of liability, if any, in the absence of the due proofs required by the terms of the policies (R. 14, 17).

Defenses of fraud, impersonation, etc., may exist.

Defenses to the policies may exist because of the provisions referred to and also because of possible fraud, misrepresentation, impersonation, etc., in the inception of the insurance (R. 9), but it is impossible to determine what defenses may apply to any particular policy unless and until due proofs have been furnished as required by the policies (R. 14, 17).

Effect of the Statute.

New York attempts to escheat the full amount of each policy even though no one knows what sum, if any, might be payable if the conditions of the policy were performed (R. 14, 17).

It deprives the appellants of all right and opportunity to receive, consider and investigate claims under the policies, and to reject and resist unjust or fraudulent claims, or to adjust doubtful claims (R. 19).

It unjustly enriches New York at the expense of the companies and all of their policyholders (R. 19).

The Statute and Its Construction.

The statute itself says that "any moneys held or owing" under these policies "shall be deemed abandoned property" (Sec. 700, R. 23). Since nothing is held or owing under any of these policies (R. 7, 14, 17), the defendant construes "held or owing" to mean "the amount which will be payable if a proper claim were presented establishing" liability (R. 12). The Court of Appeals sustained this construction (R. 65-66, 60, 52). The text of Section 700, which is the heart of the statute, and its construction, are as follows (R. 23):

Text of Sec. 700.

Sec. 700. Unclaimed life insurance corporation moneys.

1. The following unclaimed property held or owing by life insurance corporations shall be deemed abandoned property:

(a) Any moneys held or owing by any life insurance corporation which shall have remained unclaimed for seven years by the person or persons appearing to be entitled thereto under matured life insurance policies on the endowment plan issued on the lives of residents of this state.

(b) Any moneys held or owing by any life insurance corporation which are payable under other kinds of life insurance policies issued on the lives of residents of this state where the insured, if living, would, prior to the thirty-first day of December next preceding the report required by section seven hundred one, have attained the limiting age under the mortality table on which the reserves are based, exclusive of

(i) any policy which has within seven years been assigned, readjusted, kept in force by payment of premium, reinstated or subjected to loan, or

(ii) any policy with respect to which such corporation has on file written evidence received within

seven years that the person or persons apparently entitled to claim thereunder have knowledge thereof.

(c) Any moneys held or owing by any life insurance corporation due to beneficiaries under policies issued on the lives of residents of this state who have died, which moneys shall have remained unclaimed by the person or persons entitled thereto for seven years.

* * * * * *

Construction of Sec. 700.

The construction of Section 700 by the defendant, and sustained below, is as follows (R. 12, 65-66, 60, 52):

> **"Amount due. Such amount is the amount which would be payable if a proper claim were presented establishing, as the case may be, that:**
>
> **"(1) the insured survived the endowment period, or**
>
> **"(2) the insured died on the day he reached the maximum age of the mortality table"** (which age varies from about 96 to 100, according to the mortality table used), "or
>
> "(3) the identity and right to payment of a person entitled to the proceeds of a policy when the fact of the insured's death has been proven to the insurer."

Improper assumptions as to age, death, survival, cause of death, etc.

Thus the policy terms are replaced by an assumption that the insured gave his correct age, which is frequently not so (R. 8; see *New York Life* v. *Veit*, 294 N. Y. 222, where the insured was sixteen years older than stated in the policy); and that the insured died upon reaching the maximum age of the mortality table, and that he did not die under circumstances which would reduce or eliminate liability; and, as to endowments, that he survived the endowment period; and that there were no other factors which would reduce or eliminate liability.

Residence.

The words "issued on the lives of residents of this state" in Section 700 were construed as follows (R. 11-12, 64-65, 60, 51):

> "If at the time of the contract an insured was a resident of the State of New York the item" (the policy) "comes within the provisions of the statute", and "a subsequent change of residence of the insured does not remove the item from the operation of this law", and "the words 'issued on the lives of residents of this state' refer to the residence of the insured at the time the contract was made and not to his residence at any later date".

Other Provisions of Statute.

The statute requires each company to report "abandoned" policies annually and to publish for claimants (Sec. 702, R. 25). In these reports and publications the insurance companies must admit liability (Sec. 701 (2a, b and d), R. 24; Sec. 702 (3c), R. 26). If no claimants appear the companies must pay the full amount of the policy to the State (Sec. 703, R. 26-27), less the cost of publication (Sec. 1409, R. 30). The statute purports to release the companies from liability to the policyholders and beneficiaries (Secs. 1404-1405, R. 27-28). The State undertakes to pay any policyholders who subsequently file claims (Secs. 1404, 1406, 1407, R. 27-29), in which event the State deducts a service charge of 1% (not less than $3), and no interest is allowed (Sec. 1407, R. 29). The State keeps all funds not claimed (State Finance Law, Sec. 95, R. 29-30). Penalties of $100 a day are assessed against any company which fails to comply with the statute (Sec. 1412, R. 30).

Decision Below Nullifies Terms of Contracts.

The Court of Appeals holds that these policies are matured and payable (R. 65) even though it is conceded that nothing is held, owing or payable under their terms (R. 7,

14, 16, 17), and that it is impossible to determine what sum, if any, might ever become due (R. 14). It holds that they "are not essentially different" from bank accounts (R. 64), and points out that bank accounts may escheat even though the passbooks are not produced (R. 65). It sees no distinction (R. 65).

It says that the statute does not nullify any defenses except the defense of "non-compliance with policy provisions calling for due proof of death or other designated contingency" (R. 66), and other exceptions not material here, but that exception in effect destroys any other defenses because it is concededly impossible to ascertain what defenses may apply to any particular policy in the absence of due proofs (R. 14). It also deprives the companies of all right and opportunity to consider and investigate claims, and to reject or resist unjust or fraudulent claims, or to adjust doubtful claims (R. 19). As to these objections the Court's only comment was: "Maybe, as the companies say, they cannot effectually prepare possible defenses without a proof of claim, but inconvenience of that kind does not nullify the statute" (R. 66).

It holds that the statute applies retroactively to policies issued prior to its enactment (R. 65-66). It calls the statute "procedural" and sees no obstacle to giving it "a retrospective application" (R. 66).

Alternative Question of Jurisdiction to Escheat, if Policies Are Subject to Escheat.

Only one State can have jurisdiction.

If these policies are to be treated as bank accounts and subject to escheat, as held below (R. 64, 65), the question is what State has jurisdiction to escheat. Obviously the same policy can only escheat to one State, and unless this Court determines the proper jurisdiction the companies will be exposed to double or multiple liability by the escheat of the same policy to another State or to suits by the policyholders in any State (R. 20).

Conflict between New York and Pennsylvania.

Pennsylvania and New York are already in conflict, and are attempting to escheat the proceeds of the same policies upon different theories of jurisdiction (Appendix B, pp. 47-50).

New York uses dual test of delivery and insured's residence at that time.

New York claims jurisdiction if the insured resided in New York when the policies were issued, many years ago (Sec. 700, R. 23; R. 11-12), and if (as added by the construction of the statute by the New York courts) the policies were issued for delivery in New York (R. 2-3, 51, 62-63, 64-65, 60).

Appellants believe proper jurisdiction is State where company is incorporated.

The appellants believe that the States in which the insurance companies are incorporated would be the proper jurisdiction (R. 16). This is also the Pennsylvania rule (Appendix B, p. 47).

Reasons: State of incorporation of insurance company is only known jurisdictional factor; is where policies are payable, etc.; is in accord with the decisions of this Court as to bank accounts, etc.; and is the only practical jurisdiction.

The State of incorporation (the domicile) of the insurance company is the only known factor upon which to base situs and jurisdiction, the domiciles of the missing policyholders being unknown (R. 50). It is also the place where the policies, by their terms, are payable (R. 7), and where the assets behind the policies are located (R. 6, 7), and where all claims must be made (R. 6), etc. (R. 6-7). It is the jurisdiction chosen by the policyholder himself since he selected a company in that State and sent his premiums there (R. 6). It is in accord with the decisions of this

Court that abandoned bank accounts escheat to the State where the bank is situated and where the account is payable; regardless of where the depositor resided; and its decisions that funds deposited in courts escheat to the State in which the court is located (authorities cited at pages 27-28 of this brief). No State has ever attempted to escheat accounts in banks incorporated in other States, or funds on deposit in courts located in other States. Even States which have copied the New York statute in other respects have limited their statutes to domestic companies, i.e., Massachusetts and New Jersey (Appendix B, p. 50).

The New York theory is believed to be unsound legally, and is clearly impractical in fact. The place of residence and of delivery long ago usually would be impossible to determine (R. 9-10, 17, 44), and a source of continual controversy and litigation. It is impractical to apply because policies are frequently delivered in one State upon the lives of residents of another State (R. 9). What bearing the residence, long ago, of the person whose life was insured has upon the question of escheat in the present is obscure, especially as he may never have had the slightest interest in the policy even at its inception (R. 9, 14, 19), and the owner of the policy may never have been in New York (R. 9).

The facts and the law on this alternative question of jurisdiction are more fully developed at pages 26-33 of this brief, and to avoid undue repetition we respectfully request that they be deemed a part of this statement of the case.

ASSIGNMENT OF ERRORS

Appellants assign the following errors (R. 68-72):

1. The Court of Appeals of the State of New York erred in holding that the statute known as the Abandoned Property Law of the State of New York, as amended, par-

ticularly Chapters 498 (Sec. 2) and 497 of the Laws of 1944 of the State of New York, and the statute which they amend, Chapter 697 of the Laws of 1943 of the State of New York, is valid and is not repugnant to the provisions of Article I, Section 10, of the Constitution of the United States, that "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *", although said statute, as construed by said Court of Appeals, provides that the plaintiffs, which are life insurance corporations incorporated in other States, must pay to the State of New York (as or in the nature of an escheat) the sums specified in the policies of life insurance and endowment policies, issued by the plaintiffs, and described in the Complaint, and must make reports and newspaper publications offering and promising payment and admitting liability, all contrary to and without performance of the terms of the policies, as set forth in the Complaint, particularly:

(a) the provisions that the furnishing of due proofs of death or other event, to the plaintiffs is a condition precedent to liability and to payment thereunder, it being conceded that no proofs of any kind have been furnished; and

(b) the provisions that if the age of the insured was understated, as concededly it frequently is, the amount of insurance under the terms of said policies shall be reduced to the amount which the premium would have purchased at the correct age, it being conceded that it is impossible to know or determine the correct amount unless and until due proofs are submitted as required by the terms of the policies; and

(c) the provisions excluding or reducing liability in case of suicide, or of death caused by war, or military service, or aviation, or if the insured was not living and in good health when the policy was delivered and the first premium paid, it being conceded that it

is impossible to know or determine the amount of liability, if any, unless and until due proofs are furnished as required by the terms of the policies.

2. Said Court of Appeals erred in holding that said statute is valid and is not repugnant to the Fourteenth Amendment to the Constitution of the United States providing that "* * * nor shall any State deprive any person of * * * property, without due process of law; * * *", although said statute, as construed by said Court of Appeals, requires the plaintiffs to make said payments, reports and publications, described in paragraph "1" hereof:

(a) contrary to and without performance of the policy provisions described in paragraphs "1(a), 1(b) and 1(c)" hereof: and

(b) even though many defenses, total or partial, may exist to any claims which could arise under the policies, particularly defenses based upon the provisions described in paragraphs "1(a), 1(b) and 1(c)" hereof, and also defenses based upon fraud, misrepresentation, impersonation, fictitious insureds, and other frauds, it being concededly impossible to determine what defenses may apply unless and until due proof of death, or other event, is furnished as required by the terms of the policies; and

(c) even though plaintiffs are thereby deprived of all right and opportunity to receive, consider and investigate claims under said policies, and to reject or resist unjust or fraudulent claims, or to adjust doubtful claims: and

(d) even though the amounts which might become payable, if anything, under said policies is entirely speculative, and the facts essential to determining the same are entirely unknown; and

(e) even though the assets and reserves of the plaintiffs are their general property in which they have

the beneficial ownership, and are not deposits or trust funds and are not ear-marked or held under or for any particular policy; and

(f) even though the effect and result is that the State of New York virtually liquidates and takes over this part of the plaintiffs' business and assets, and deprives them of their property and of the right to conduct such business as authorized by their charters granted by the States in which they are incorporated; and

(g) even though the State of New York has no jurisdiction to compel such payments and other acts (in the nature of escheat) in regard to any such policies, the proper jurisdiction (if any debts exist thereunder) being in the State of incorporation (the domicile) of the insurance company which issued the policies.

3. Said Court of Appeals erred in holding that such policies or the face amounts thereof are matured and represent "unclaimed life insurance funds" and "debtor obligations" susceptible to escheat, and subject to the jurisdiction of the State of New York for such purpose or a taking of that nature, and in sustaining the validity of the statute for that purpose, in that said holdings have no support in the record and are contrary to the conceded facts (mentioned briefly in these Assignments of Errors but more fully stated in the Complaint), and said holdings and statute are repugnant to Article I, Section 10, of the Constitution of the United States, and the Fourteenth Amendment thereto, in that they impair the obligations of said contracts and deprive plaintiffs of their property without due process of law.

4. If (contrary to the plaintiffs' contentions) any sums are to be deemed held or owing under such policies, said Court of Appeals nevertheless erred in holding that the State of New York has jurisdiction to take the same by said

statute as an escheat, or otherwise, in view of the conceded facts that the State of incorporation of each of the plaintiffs, not the State of New York, is the place where they are payable, and where all claims must be made, where the assets of the insurance company are located, where premiums are payable, where claims are paid and policy loans made, where the officials and records of the company are located, and where all other business relating to the policies is transacted, other than the solicitation of insurance and delivery of policies by local agents in various States, as more fully set forth in the Complaint; and that the whereabouts or domiciles of the holders of these "abandoned" policies are unknown; and that every year many thousands of policyholders move from one State to another; and that the residences of the insureds at the time that the policies were issued and also the place of delivery thereof (the factors upon which said Court holds the State of New York has jurisdiction) are unknown and impossible to determine and would always be uncertain and impractical factors (and the plaintiffs claim that such factors are of no legal or practical materiality in determining situs and jurisdiction for the purpose of escheat); and therefore the statute and the holding of said Court are repugnant to the Fourteenth Amendment to the Constitution of the United States in that they deprive the plaintiffs of their property without due process of law and expose them to full liability under the same policies to the State of New York and to the State having jurisdiction, and to the policyholders who may sue in any State.

5. Said Court of Appeals erred in affirming, as modified, and in failing to reverse, the judgments and orders of the lower courts of the State of New York, to wit, the judgment of affirmance of the Supreme Court of the State of New York dated March 19, 1947, entered upon the order of affirmance dated March 14, 1947, of the Appellate Division, First Department, of said Supreme Court, which

judgment and order affirmed the judgment of the Supreme Court of the State of New York, for the County of New York, the court of first instance, dated October 24, 1946, and said Court of Appeals erred in failing to declare said statute to be entirely void in its application to foreign life insurance companies and to said policies issued by them, and in so doing erred in rejecting the plaintiffs' contentions that said statute is repugnant to Article I, Section 10, of the Constitution of the United States, and the Fourteenth Amendment thereto, in that it impairs the obligations of said contracts and takes the plaintiffs' property without due process of law, under the facts set forth in the Complaint, all of which are conceded, and for the reasons therein stated.

SUMMARY OF ARGUMENT

(1) The statute impairs the obligations of the policies and takes property belonging to the insurance companies, and all their policyholders, without due process of law, for the benefit of New York.

The policies provide that they are payable only upon receipt of due proof of death, age, etc. No such proof has been furnished. Nothing is held, owing or payable. There is nothing to escheat.

The policies contain provisions which may reduce or eliminate liability if death was caused by suicide, war, or aviation, or if the age of the insured was misstated, or if there was a breach of condition as to the insured's good health when the policy was issued. As no one knows whether the insured is living or dead, or the cause of death, the correct age, etc., it is impossible to determine the amount of insurance.

The statute impairs these provisions by forcing payment in full to the State even though no one can possibly tell what sums if any, might ever become payable.

It nullifies all possible defenses, and forces payment arbitrarily. It deprives appellants of all opportunity to consider or investigate claims, or to reject or resist unjust or fraudulent claims, or to adjust doubtful claims. It virtually liquidates this portion of their business and transfers it to the State of New York.

The statute permits some policyholders to collect worthless or even fraudulent claims by merely waiting until the State collects from the insurance companies. If the State can resist such claims, even in part, it follows that the State had no right to collect from the companies in the first place.

(2) (Alternative Question of Jurisdiction.) If these policies are no different from bank accounts, as held below, then, like bank accounts, jurisdiction to escheat would be in the State where the institution is incorporated, which is also the place where the contracts would be payable, and where the assets behind the contracts are located, etc.

Jurisdiction to escheat (if these policies are subject to escheat) must be limited to one State.

The State of incorporation (the domicile) of the insurance company is the proper jurisdiction. It is the only known factor, the domiciles of the missing policyholders being unknown. It is the place where the policies are payable and where the assets behind the policies are located, etc. It is the jurisdiction selected by the policyholder himself since he selected a company in that State and sent his premiums there.

The decisions of this Court hold that abandoned bank accounts escheat to the State where the bank is situated and where the account is payable, regardless of where the depositor resided; also, that funds deposited in courts escheat to the State in which the court is located because the fund is deemed to be within the State and payable there.

No State has ever attempted to escheat accounts in banks incorporated in other States, or to escheat funds on deposit in a court located in another State.

Statutes of other States are all limited to policies issued by domestic corporations.

The right to escheat depends upon the present location of the property, not its origin. In this union of many sovereign States, situs and jurisdiction over intangibles must be based upon a common sense appraisal of the requirements of justice and convenience under the particular circumstances and for the particular purpose.

It is obviously more practical for the purpose of escheat that each company report to its State of incorporation, instead of to 48 States, each with its own statute and rules. In fact, no other method is workable at all, certainly not the New York theory.

New York claims jurisdiction if the insured resided in New York when the policies were issued, many years ago, and if the policies were delivered in New York. This is unsound under any recognized rule for determining situs or jurisdiction for the purpose of escheat. It is virtually impossible to apply because the residence and place of delivery are usually impossible to determine as to these old policies. It lacks the certainty and convenience which the State of incorporation of the insurance company would afford. It is unworkable as to policies delivered in one State upon the lives of residents of another State, which frequently occurs.

Where the insured resided many years ago is immaterial. He may never have had the slightest interest in the policy. The owner of the policy may never have been in New York. If the insured is living, it is likely that he has long since moved to another State. If he is dead, the beneficiary probably lives in one of the other 47 States, or in some foreign country.

Where the policy was delivered many years ago is immaterial because in escheat we are concerned with where the property is, not where it came from.

The Pennsylvania statute claims jurisdiction if a policy was issued by a Pennsylvania insurance company regardless of whether the insured resided in New York or elsewhere when the policy was issued. Both States want the proceeds of the same policies. These conflicting theories of jurisdiction can be settled only by this Court. The Pennsylvania rule has simplicity, precedent, and common sense to recommend it.

The cases cited by the Court of Appeals have no bearing upon escheat or upon jurisdiction for that purpose. They hold that two States may impose death taxes under some circumstances, but obviously the same policies cannot escheat to two States. They also hold that foreign corporations must comply with licensing requirements and regulations which has no analogy here. Others hold that corporations may be subjected to unemployment and premium taxes in any State where they are doing business, but clearly these policies cannot escheat to every State in the Union. There are also the cases holding that a debt can be attached in any State where the debtor can be served with process, but to apply such a theory to escheat would be to say that the State which first enacts an escheat statute gets jurisdictions.

ARGUMENT

Point I.

New York cannot make these policies payable contrary to their terms, and deprive the companies of all possible defenses, in order to escheat property which belongs to the insurance companies and all of their policyholders.

Nothing is due so nothing can escheat.

These life insurance policies provide that they are payable only upon receipt of due proof of death, age, and (in the case of endowments) survival of the specified period (R. 6-7, 14, 17, 65). No such proof has been furnished (R. 14, 17, 52, 65), and therefore nothing is payable (R. 14, 17; *Bergholm* v. *Peoria Life Ins. Co.*, 284 U. S. 489; *O'Reilly* v. *Guardian Mutual*, 60 N. Y. 169; *Wachtel* v. *Equitable Life*, 266 N. Y. 345).

Where nothing is due, there is nothing to escheat.

The statute purports to escheat "monies held or owing" under these policies (Sec. 700, R. 23), but nothing is held or owing (R. 7, 14, 17). However, "held or owing" was construed below to mean "the amount which would be payable if a proper claim were presented establishing" liability (R. 12). A clearer case of impairing the obligation of a contract is hardly conceivable.

The Court of Appeals attempts to justify this by calling the policies matured (R. 65). It does not explain how or when they matured. If matured means due or payable, they certainly are not matured (R. 14, 17). No policyholder could maintain a suit under these policies without furnishing due proofs (authorities cited above). The State has no greater rights.

Due proofs of death, age, etc., essential to determining liability and amount,—not a mere formality like production of a bank book.

The Court of Appeals says that due proofs are unnecessary because the production of a bankbook is not essential to the escheat of a bank account (R. 64, 65), citing *Provident Inst. for Savings* v. *Malone*, 221 U. S. 660. The distinction is that a bank account is a liquidated debt payable unconditionally upon mere demand, the production of the bankbook being a formality having no bearing upon the existence or amount of the debt. These insurance policies are not debts, but are unperformed conditional contracts, and the facts essential to determining liability, or the amount of liability, are entirely unknown and speculative.

The requirement of these policies that they are payable only upon receipt of due proofs of death, age, etc., is not a mere formality. The insurer is entitled to know whether the insured is living or dead, and if death is shown it then becomes the insurer's right and duty to consider the cause of death, age, etc., because, under the terms of the policies, this may greatly reduce liability or eliminate it entirely (R. 8, 9, 14, 17). We refer particularly to the provisions as to age, suicide, war and aviation, good health when the policies were issued, etc. (R. 8, 9, 14, 17), which are described more fully earlier in this brief at pages 3-4. The validity of such provisions is unquestioned (*New York Life* v. *Vail*, 294 N. Y. 222, as to misstatement of age reducing a policy from $25,000 to $15,000; *Belsky* v. *N. Y. Life*, 255 App. Div. 288, aff'd 280 N. Y. 614, as to suicide; *Vanderbilt* v. *Travelers*, 112 Misc. 248, aff'd 202 App. Div. 738, aff'd 235 N. Y. 514, as to war clauses; *Geer* v. *Union Mutual*, 273 N. Y. 261, as to misrepresentations, whether innocent or fraudulent; and many others).

Although amount of coverage is speculative New York wants to collect in full.

No one knows whether the insured is dead or how death occurred, or the correct age, etc., and it is impossible to

determine these things where no proofs have been filed with the insurer (R. 8, 14, 17). If claims were filed under these policies, some might be entitled to collect in full, others in part, and others nothing at all. The State wants to collect in full on all.

By stripping the companies of all rights under the contracts the State takes money which legally and morally belongs to the companies and all of their policyholders.

The net result of this statute, as interpreted by the appellee and by the Court of Appeals, is to deprive the companies of their contract rights, and of all opportunity to consider and investigate claims, or to reject or resist unjust or fraudulent claims, or to adjust doubtful claims (R. 19). It virtually liquidates and takes over this part of their business and assets (R. 19), in which they have the beneficial ownership, no trust funds being involved, and nothing being earmarked or held for any particular policy either in fact (R. 7), or in law (*People* v. *The Security Life*, 78 N. Y. 114; *Uhlman* v. *New York Life*, 109 N. Y. 421). It gives to New York money which legally and morally belongs to the companies and all of their policyholders (R. 19).

The State, and many undeserving claimants, will be unjustly enriched at the expense of the companies and their other policyholders.

The statute says that the State will pay policyholders who later appear and demand their money (Secs. 1404, 1406, 1407, R. 27-9). If the State pays them in full, without investigating the merits (as distinguished from the mere identity of the claimants), it is obvious that many claimants will be unjustly enriched at the expense of the insurance companies. If the State investigates and successfully resists a claim, in whole or in part, the State keeps the money which should never have been taken from the insurance company in the first place. Indeed, the State could hardly resist or even investigate the merits of a

claim without conceding that there was no debt to escheat. The net result is that a policyholder could collect even a worthless or fraudulent claim by merely waiting until the State collects from the insurance company.

Although policies require proof of liability the companies are told to prove non-liability.

Instead of getting proof of liability, the companies are told to prove non-liability. The insured may be in China or Russia, yet the companies are told to prove that he is living or that he died in a manner not covered by the policy. The task would be impossible in most instances, even if large sums were wasted in the attempt. Neither the contracts nor the premium rates contemplate any such burden. Indeed it was to guard against any such thing that the policies specifically provide that they are payable, not at death, but only upon due proof of death, age, etc. (R. 6-7, 14, 17, 65). In the case of endowments, due proof that the insured survived the endowment period, and the correct age, is required (R. 7). When such proofs are received, the companies can see when, where, and how the insured died, and can properly determine the amount of liability, if any. Any investigations needed after receiving due proofs would be comparatively simple because at the very least the proofs would show when and where the death occurred, the age, etc.

Authorities show statute repugnant to Article 1, Sec. 10, and Fourteenth Amendment.

To nullify the terms and conditions of these policies in order to create an escheatable obligation is repugnant to Article 1, Sec. 10, and to the Fourteenth Amendment (*Lynch* v. *United States*, 292 U. S. 571; *Home Ins. Co.* v. *Dick*, 281 U. S. 397; *Boswell* v. *Security Mutual Life Ins. Co.*, 193 N. Y. 465, 473; *Sturges* v. *Crowninshield*, 4 Wheat. 122, 197; and many others). In the *Boswell* case the opinion states (p. 474), "In 2 Story on the Constitution (Sec. 1385) the learned author lays down the rule as follows: 'It

is perfectly clear, that any law which enlarges, abridges or in any manner changes the intention of the parties, resulting from the stipulations in the contract, necessarily impairs it.'"

State cannot dispense with performance of policy conditions, or impose new conditions.

State legislatures cannot tamper with contractual obligations merely because they may consider the provisions less important than do the contracting parties, as held in *Green* v. *Biddle*, 8 Wheaton 1, 84, as follows:

> "The objection to a law, on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation."

In *Bank of Minden* v. *Clement*, 256 U. S. 126, it was said that a contract "is not, by the Constitution, to be impaired at all" and that it "is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force" (p. 128).

A defense is property.

A defense is property, just as much as a right of action, and is equally protected by the Constitution. *Pritchard* v. *Norton*, 106 U. S. 124, 132, states the principle as follows:

> "Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away. A vested right to an existing defense is equally protected, saving only

those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract and are not based on equity and justice."

The Court of Appeals says that the statute does not take away these defenses except the defense that due proof has not been furnished (R. 66). That exception, vital in itself, simultaneously destroys all other defenses. It does so by forcing a premature assertion of these defenses in the face of the conceded fact that it is impossible to ascertain what defenses may apply until due proofs of death, age, etc., have been furnished (R. 8, 14, 17).

A defense is a right to resist a claim at the proper time, not a duty presently to assert hypothetical defenses to hypothetical claims.

A defense is a right to resist a claim at the proper time. It is not the doubtful privilege of embarking upon a costly and hopeless search for information about these missing policyholders in order presently to assert hypothetical defenses to hypothetical claims. The policies contain no such obligation, and none was ever intended. On the contrary, the very purpose of requiring due proof of death was to enable the companies to learn where, how, and when the death occurred, whereupon further investigations could be made to determine what defenses might then exist.

Purpose of due proofs is to give insurer a reasonable opportunity to investigate the merits of a claim; frequently proofs show on their face that little or nothing is due.

In *Aetna Life* v. *Moyer*, 113 F. 2d 974, 977, the Court said that the purpose of a policy provision "requiring due proof * * * is self-evident" and "is designed to give the insurer reasonable opportunity to investigate and test the validity of the claim". Frequently the proofs show on their face that little or nothing is payable under a policy (*Wachtel* v. *Equitable Life*, 266 N. Y. 345; *Rudolph* v. *John Hancock*, 251 N. Y. 208).

Unlike these policies, bank accounts are liquidated debts payable upon mere demand.

These unperformed conditional insurance contracts cannot be put in the same category with abandoned bank accounts where definite debts are payable unconditionally upon mere demand (*Anderson National Bank* v. *Luckett*, 321 U. S. 233; *Security Bank* v. *California*, 263 U. S. 282).

If there be any gain from "abandoned" policies it belongs to the companies and all of their policyholders.

The reason that no claims have been made under some of these policies is no doubt because the policyholder knew that the policy was not enforceable for some reason (R. 9, 19). Any benefit the companies may derive from policies under which no claims are made belongs to the companies, and their policyholders, since they bear the burden of excessive claims on other policies (R. 19), just as any business has its profits and losses. The bulk of the country's life insurance is carried in mutual companies (Enc. Britannica, 14th Ed., Vol. 14, p. 55; Enc. Am., Vol. 15, p. 187).

Point II.

(Alternative Question of Jurisdiction)

Property can escheat only to one State. New York lacks jurisdiction and payment to it will be no defense to escheat in the State having jurisdiction, or to suits by policyholders in any State. Due process requires jurisdiction (*Pennoyer* v. *Neff*, 95 U. S. 714, 733).

Appellants believe that the State of incorporation (the domicile) of the insurance company is the proper jurisdiction, if these policies are subject to escheat at all (R. 16). Their reasons follow.

Why State of Incorporation Would Have a Superior Claim to Jurisdiction If Policies Are Subject to Escheat.

(1)

Is only known jurisdictional factor since domiciles of missing policyholders are unknown.

It is the only known factor upon which situs and jurisdiction can be based, because the domiciles of the missing policyholders or beneficiaries are unknown (R. 50). The domicile of the insurance company is always known and never changes.

(2)

Is place where policies are payable, etc.

It is the place where the policies are payable by their terms (R. 7), and where the assets behind the policies are located (R. 6, 7), and where all claims (R. 6) and other transactions in connection with the policies must be made under the terms thereof (R. 6-7).

(3)

Policyholders chose company in foreign State.

It is the jurisdiction selected by the policyholder himself since he chose to place his insurance in a company incorporated in that State and sent his money there (R. 6).

(4)

Bank accounts escheat where bank is located.

It is in accord with the decisions of this Court that abandoned bank accounts escheat to the State in which the bank is situated and where the account is payable, regardless of where the depositor resided (*Anderson National Bank* v. *Luckett*, 321 U. S. 233; *Security Bank* v. *California*, 263 U. S. 282).

No State has ever attempted to escheat accounts in banks incorporated in other States.

In the *Anderson* case it was held that Kentucky had jurisdiction to escheat deposits in a Kentucky bank, because the bank was located there, and the funds were on deposit there, and payable there, "and hence are subject to the state's domination" (p. 241), being "a part of the mass of property within the state whose transfer and devolution is subject to state control" (p. 248). In the *Security Bank* case it was held that California had jurisdiction to escheat deposits in a California bank, because the bank was located there, and the money was on deposit there, and payable there. It linked the debt with the assets behind the debt by pointing out that, in effect, a deposit "gives the bank merely the right to use the depositor's money until called for by him" (p. 286). It is "intangible property within the state" (p. 285).

(5)

Court funds escheat where Court is located.

It is in accord with the holding of this Court that funds on deposit in a court escheat to the State in which the court is located, because the fund is deemed to be within the State and is payable there (*U. S.* v. *Klein*, 303 U. S. 276, also cited at 106 F. 2d 213, cert. denied 308 U. S. 618).

No State has ever attempted to escheat funds on deposit in a court located in another State.

In the *Klein* case it was held that Pennsylvania had jurisdiction to escheat because the funds due to the missing bondholders of the Pennsylvania Railroad were on deposit in and subject to distribution by the United States District Court in Pennsylvania. No one would seriously suggest that the State where the bonds were originally sold or delivered would have jurisdiction to escheat—yet such is the theory applied by the Court of Appeals to the policies in the case at bar.

(6)

Statutes of other States restricted to domestic companies.

It is in accord with similar statutes in other States all of which are limited to policies issued by domestic corporations, i.e., the Pennsylvania, Massachusetts and New Jersey statutes cited and described in Appendix B (p. 47). New York is the only State which attempts to escheat policies issued by foreign companies. Even the New York statute was limited to domestic companies until the amendments of 1944, which caused the present litigation, and at the next session of the New York Legislature, in 1945, a bill was passed to repeal the amendments and limit the statute, as before, to domestic companies, but the Governor vetoed the bill for other reasons (Appendix B, p. 49).

(7)

Where contract originated is immaterial.

It is in accord with the principle that escheat is a reverting of title to the sovereign within whose domain the property is located, regardless of where the property originated. An automobile purchased in New York, but abandoned in California, escheats to California. If a New Yorker sends his money to a Kentucky bank, Kentucky has jurisdiction, because it has primary jurisdiction over the debtor and over "the mass of property" which stands behind the debt (*Anderson National Bank* v. *Luckett*, 321 U. S. 233, *supra*).

(8)

Practical considerations important in determining jurisdiction of intangibles.

It is in accord with the principle that in this union of many sovereign states, situs and jurisdiction should be based upon "a common-sense appraisal of the requirements of justice and convenience in particular conditions", as stated by Judge Cardozo in *Severnoe Securities* v. *L. & L. Ins. Co.*, 255 N. Y. 120 (1931). He analyzed the situs of debts as follows:

> (page 123) "* * * The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. The locality selected is for some purposes, the domicile of the creditor" (but in the case at bar this is concededly unknown) "for others, the domicile or place of business of the debtor * * *" (the State of incorporation of the insurance company is always known) "for others, any place where the debtor can be found" (the insurance companies do business in practically every State but property can escheat to only one State). "At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions * * * *"

(9)

Wasteful to report to 48 States, each with different statute and rules.

It is practical because each company would report only to its State of incorporation, as in the case of bank accounts, etc., instead of to possibly 48 States, each with its own statute and rules. The preparation of these reports involves substantial expense for which the companies are not compensated (R. 12).

Erroneous Theory of Decision Below.

New York claims jurisdiction to escheat under this statute if the policies were upon the lives of persons who were residents of New York many years ago when the policies were issued (Sec. 700, R. 23; R. 11-12), with the further proviso, added by the construction of the New York courts, that the policy must have been issued for delivery in New York (R. 2-3, 51, 62-3, 64-5, 60). This is unsound for the following reasons.

(1)

Place of residence and delivery years ago immaterial, and impractical to apply.

The residence many years ago is immaterial under any recognized rule for ascertaining situs or jurisdiction for this purpose (R. 43, 44). The place of delivery is equally immaterial. Combining the two does not help. On the contrary, one might well ask what happens to policies delivered in one State upon the lives of residents of another State (R. 9).

(2)

Place of residence and delivery long ago usually impossible to determine and source of endless controversy.

It is impractical because the residence of the insured many years ago, and the place of delivery of these old

policies, are unknown and usually impossible to determine (R. 9-10, 17, 44). At best, they would be uncertain factors open to endless controversy and litigation. It has never been customary in the insurance business to inquire into the legal residences of persons taking out insurance, and many who gave New York addresses may have resided in other States (R. 9-10). The companies have no knowledge of or practical means of determining their legal residences (R. 9-10).

(3)

Conflict with Pennsylvania statute.

It is in direct conflict with the Pennsylvania statute which claims jurisdiction to escheat if the policy was issued by a Pennsylvania insurance company, regardless of where the insured resided or where the policy was delivered (Appendix B, p. 47). Obviously one of these theories of jurisdiction is wrong since the same policies cannot escheat to both New York and Pennsylvania. This jurisdictional conflict can only be settled by this Court. The Pennsylvania rule (if these policies are to be subjected to escheat at all) seems sounder from every view, including simplicity, practicability and precedent.

(4)

Owner of policy may never have been in New York.

The residence, when the policy was issued, of the person whose life was insured is immaterial for the further reason that he may never have had the slightest interest in the policy, even at its inception (R. 9, 14, 19). The insurance may have been obtained by an employer, creditor, partner, husband, wife, parent, or other person (R. 9, 14, 19). It may have been assigned (R. 8-9). The owner or beneficiary of the policy may never have been in New York (R. 9). The last known address of the insured or beneficiary may be another State (R. 9).

(5)

Escheat relates to present location of property, not its origin.

The place of delivery of the policy, many years ago, is immaterial because escheat has to do with the present location of the property, not its origin long ago.

Cases Cited in Decision Below Not Applicable to Escheat.

The Court of Appeals does not discuss the legal, factual, or practical factors involved, or the jurisdictional conflict with the Pennsylvania statute. It holds tersely that "the policies were issued upon the lives of residents of this State and were delivered within its borders by corporations doing business therein" and "the core of the debtor obligations of the plaintiff companies was created through acts done in this State under the protection of its laws and the ties thereby established between the companies and the State were without more sufficient to validate the jurisdiction here asserted by the Legislature" (R. 65), citing the following cases involving multiple jurisdiction for purposes of taxation, attachment, etc., none of which are relevant to escheat because the same property can only escheat to one State.

Curry v. McCanless, 307 U. S. 357, holds that two States may impose death taxes under some circumstances. However, the same property cannot escheat to two States.

Hoopeston Co. v. Cullen, 318 U. S. 313, holds that if a reciprocal insurance association does business in a foreign State, it must comply with its licensing requirements and regulations. No possible analogy to escheat is to be found in that case.

International Shoe Co. v. *Washington*, 326 U. S. 310, and *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, hold that corporations may be subjected to unemployment and discriminatory premium taxes in any State where they are doing business. If this rule applied to escheat, the appellants might be required to pay the full amount of each policy to nearly every State in the Union.

Harris v. *Balk*, 198 U. S. 215, *Morris Plan Bank* v. *Gunning*, 295 N. Y. 324, and *Feinman* v. *Marks*, 294 N. Y. 367, hold that a debt can be attached in any State where the debtor can be served with process. The first attachment reduces the debt *pro tanto* so that the debtor will not be exposed to multiple liability. The vigilant creditor takes precedence. To apply such a theory to escheat would be to say that the State which first enacts an escheat statute gets jurisdiction.

CONCLUSION

The judgment of the Court of Appeals of the State of New York should be reversed.

Respectfully,

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November 26, 1947.

APPENDIX A.

Pertinent Provisions of Statute.

Text of the Abandoned Property Law of the State of New York, as amended, insofar as it applies to life insurance companies, being Chapter 697 of the Laws of 1943, as amended by Chapters 497 and 498 (Sec. 2) of the Laws of 1944, also known as Chapter 1 of the Consolidated Laws of the State of New York.

NOTE:

In Sec. 103 the words in italics were added, and the words in brackets were deleted, by Chapter 498 (Sec. 2) of the Laws of 1944, thereby making the statute apply to foreign life insurance corporations.

In Secs. 700, 701, 702 and 703, the words in italics were added, and the words in brackets were deleted, by Chapter 497 of the Laws of 1944.

ARTICLE 1—SHORT TITLE; DECLARATION OF POLICY; DEFINITIONS

§101. Short title.

This chapter shall be known and may be cited as the "Abandoned Property Law."

§102. Declaration of policy.

It is hereby declared to be the policy of the state, while protecting the interest of the owners thereof, to utilize escheated lands and unclaimed property for the benefit of all the people of the state, and this chapter shall be liberally construed to accomplish such purpose.

§103. Definitions.

* * *

(d) "[Domestic] Life insurance corporation" means any [authorized] insurer corporation [incorporated and] organized under [any] *the* laws of this state [having power] *or any foreign corporation authorized* to do either one or both kinds of insurance business authorized in paragraphs one and two of section forty-six of the insurance law, as amended from time to time.*

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*NOTE:

The Insurance Law, Sec. 46, paragraphs 1 and 2, read as follows:

1. "Life insurance," meaning every insurance upon the lives of human beings and every insurance appertaining thereto. The business of life insurance shall be deemed to include the granting of endowment benefits; additional benefits in the event of death by accident or accidental means; additional benefits operating to safeguard the contract from lapse, or to provide a special surrender value, in the event of total and permanent disability of the insured; and optional modes of settlement of proceeds.

2. "Annuities," meaning all agreements to make periodical payments where the making or continuance of all or of some of a series of such payments, or the amount of any such payment, is dependent upon the continuance of human life, except payments made under the authority of paragraph one.

ARTICLE VII—UNCLAIMED LIFE INSURANCE FUNDS

§700. Unclaimed [domestic] life insurance corporation moneys.

1. The following unclaimed property held or owing by [domestic] life insurance corporations shall be deemed abandoned property:

(a) Any moneys held or owing by any [domestic] life insurance corporation which shall have remained unclaimed for seven years by the person or persons appearing to be entitled thereto under matured life insurance policies on the endowment plan issued on the lives of residents of this state.

(b) Any moneys held or owing by any [domestic] life insurance corporation which are payable under other kinds of life insurance policies issued on the lives of residents of this state where the insured, if living, would, prior to the thirty-first day of December next preceding the report required by section seven hundred one, have attained the limiting age under the mortality table on which the reserves are based, exclusive of

(i) any policy which has within seven years been assigned, readjusted, kept in force by payment of premium, reinstated or subjected to loan, or

(ii) any policy with respect to which such corporation has on file written evidence received within seven years that the person or persons apparently entitled to claim thereunder have knowledge thereof.

(c) Any moneys held or owing by any [domestic] life insurance corporation due to beneficiaries under policies issued on the lives of residents of this state who have died, which moneys shall have remained unclaimed by the person or persons entitled thereto for seven years.

2. Any such abandoned property held or owing by a [domestic] life insurance corporation to which the right to receive the same is established to the satisfaction of such corporation shall cease to be deemed abandoned.

§701. Annual report of abandoned property.

1. On or before the first day of April in each year every [domestic] life insurance corporation shall make a verified

written report to the state comptroller, which shall contain a true and accurate statement, as of the first day of January next preceding, of all abandoned property specified in section seven hundred, held or owing by it.

2. Such report shall set forth:

(a) The name and last known address of any person or persons appearing from the records of such [domestic] life insurance corporation to be entitled to receive any such abandoned property;

(b) The amount appearing from the records of such corporation to be due;

(c) The policy number and policy age of the insured;

(d) The date such abandoned property was payable;

(e) The names and last known addresses of each beneficiary appearing in the records of the insurer; and

(f) Such other identifying information as the state comptroller may require.

3. Such report shall be in such form and the abandoned property listed shall be classified in such manner as the state comptroller may prescribe. Names of persons appearing to be entitled to such property or of beneficiaries appearing in such report shall be listed in alphabetical order within each such classification.

4. In case any [domestic] life insurance corporation shall on the first day of January in any year neither hold nor owe any abandoned property specified in section seven hundred, it shall on or before the first day of April next succeeding make a verified written report to the state comptroller so stating.

§702. Publication of list of abandoned property.

1. Within thirty days after making a report of abandoned property pursuant to the provisions of section seven hundred one, such life insurance corporation shall cause to be published a notice entitled: "NOTICE OF NAMES OF PERSONS APPEARING AS OWNERS OF CERTAIN UNCLAIMED PROPERTY HELD BY (name of life insurance corporation)."

2. Such notice shall be published once [in two newspapers published in the city or village] *a week for two successive weeks in a newspaper published in the county of the state* in which is located the last-known address of the holder of a policy under which such abandoned property is payable. [; provided, however, that if such address is in the city of New York, such publication shall be in two newspapers published in the county where such address is located. If there is only one newspaper published in any such city or village, such notice shall be published in such newspaper and in a newspaper published in the county where such address is located. If there are no newspapers published in such city or village, then such publication shall be in two newspapers published in the county where such address is located, or, if there is only one such newspaper published in such county, then in such newspaper, or, if there are no newspapers published in such county, then in a newspaper published in an adjacent county. All newspapers in which such notice shall be published shall be newspapers printed in the English language.] *If there are no newspapers published in such county then such notice shall be published in a newspaper published in an adjacent county. If such last-known address is outside of the state of New York, such publication shall be in such newspaper published in this state as may be designated by the state comptroller. Such notices shall be published in newspapers printed in the English language.*

3. Such notice shall, in accordance with the classification prescribed by the state comptroller for the report pursuant to the provisions of section seven hundred one, set forth:

(a) the names and last known addresses which were in such report, of all persons appearing to be entitled to any such abandoned property amounting to ten dollars or more. Such names shall be listed in alphabetical order. [If, however, such life insurance corporation has reported abandoned property payable on policies whose holders' last known addresses are in more than one city or village or, in the case of New York city, more than one county, the names shall be listed alphabetically for each such city, village or county and such notice shall include only the names of the persons appearing to be entitled to abandoned property payable on policies whose holders' last known addresses are in such city, village or county;]

(b) such other information as the state comptroller may require; and

(c) a statement

(i) that a report of unclaimed amounts of moneys held or owing by it has been made to the state comptroller and that a list of the names of the person or persons appearing from the records of such life insurance corporation to be entitled thereto is on file and open to public inspection at its principal office or place of business in any city, village or county where any such abandoned property is payable;

(ii) that such unclaimed moneys will be paid by it on or before the succeeding thirty-first day of August to persons establishing to its satisfaction their right to receive the same; and

(iii) that in the succeeding month of September, and on or before the tenth day thereof, such unclaimed moneys still remaining will be paid to the state comptroller and that it shall thereupon cease to be liable therefor.

4. Such life insurance corporation shall file with the state comptroller on or before the tenth day of May in each year proof by affidavit of such publication.

§703. Payment of abandoned property.

1. In such succeeding month of September, and on or before the succeeding tenth day thereof, every such [domestic] life insurance corporation shall pay to the state comptroller all abandoned property specified in such report, excepting such abandoned property as since the date of such report shall have ceased to be abandoned.

2. Such payment shall be accompanied by a statement setting forth such information as the state comptroller may require relative to such abandoned property as shall have ceased to be abandoned.

NOTE:

Subsequent to the commencement of the action, the following section was added by Ch. 452 of the Laws of 1946, approved April 4, 1946:

§707. Reimbursement for claims paid by insurers.

Any life insurance corporation which has paid to the state comptroller moneys deemed abandoned property pursuant to the provisions of this article may make payment to any person entitled to all or any part thereof and shall thereby acquire all of the rights of such person to payment by the state comptroller.

ARTICLE XIV—GENERAL PROVISIONS

§1400. Statutes of limitations not a bar.

The expiration of any period of time specified by law, during which an action or proceeding may be commenced or enforced to secure payment of a claim for money or recovery of property, shall not prevent any such money or property from being deemed abandoned property, nor affect any duty to file a report required by this chapter or to pay or deliver to the state comptroller any such abandoned property; and shall not serve as a defense in any action or proceeding by or on behalf of the state comptroller to compel the filing of any report or the payment or delivery of any abandoned property required by this chapter or to enforce or collect any penalty provided by this chapter.

§1404. Assumption of liability by the state.

1. The care and custody * * *

(i) * * * of all abandoned property paid to the state comptroller pursuant to this chapter, is hereby assumed for the benefit of those entitled to receive the same, and the state shall hold itself responsible for the payment of all claims established thereto pursuant to law; less any lawful deductions, which cannot be paid from the abandoned property fund.

* * *

2. Any person, copartnership, unincorporated association or corporation making a payment of abandoned property to the comptroller shall immediately and thereafter be relieved and held harmless from any or all liability for any claim or claims which exist at such time with reference to such abandoned property or which may thereafter be made or may come into existence on account of or in respect of any such abandoned property.

3. No action shall be maintained against any person, copartnership, unincorporated association or corporation, or any officer thereof, for

(a) the recovery of abandoned property paid to the state comptroller pursuant to this chapter or for interest thereon subsequent to the date of the report of such abandoned property to the state comptroller pursuant to this chapter; * * * or

(c) damages alleged to have resulted from any such payment.

§1405. Interest not to run after report of abandoned property.

Notwithstanding any other provision of law, no owner of abandoned property shall be entitled to receive interest on account of such abandoned property from and after the date a report of such abandoned property is made to the state comptroller pursuant to this chapter, whether or not he was entitled to interest on such property prior to such date. No claimant to abandoned propery heretofore paid to the state comptroller shall be entitled to receive interest on account of such property, whether or not he was entitled to interest on such property prior to such payment.

§1406. Claims for abandoned property heretofore or hereafter paid to the state.

1. (a) Claim may be filed with the state comptroller for any abandoned property heretofore paid to the state or hereafter paid to the state comptroller pursuant to this chaper * * * (Note: Part omitted is not pertinent to life insurance.)

(b) The comptroller shall possess full and complete authority to determine all such claims and shall forthwith send written notice of such determination to the claimant. At any time within four months thereafter, such claimant may apply for a hearing and a redetermination of his

claim. After an appropriate hearing on notice, before the comptroller or person duly designated by him, the comptroller shall make and serve his final determination, which alone shall be reviewable by application to the supreme court, Albany County, upon not less than ten days' notice to the comptroller.

(c) The comptroller, or any person duly designated by him, is empowered to take testimony and proofs, under oath, upon such hearing, and shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents pertinent to such hearings.

* * *

§1407. Payment by state comptroller.

Any claim which is allowed by the state comptroller or ordered to be paid by him by a court of competent jurisdiction pursuant to the provisions of section fourteen hundred six, together with such costs and disbursements as may be allowed by the court, shall be paid out of the abandoned property fund and the comptroller shall not be liable in any action for any claim paid by him in good faith. There shall be deducted by the state comptroller from any claim allowed or the amount, other than costs and disbursements allowed by the court, of any claim ordered to be paid by him by a court of competent jurisdiction, one per cent, but in no event less than three dollars, from any such payment as a service charge, and such amount shall remain in the abandoned property fund.

If during any session of the legislature there are insufficient moneys in the abandoned property fund to pay all claims which have been allowed by the state comptroller or ordered to be paid by him by a court of competent jurisdiction, the state comptroller shall so certify to the legislature, which shall appropriate from the general fund to the abandoned property fund * an amount sufficient to pay such claims.

NOTE:

Whenever the Abandoned Property Fund exceeds $750,000, the excess becomes the absolute property of the State of New York, under the State Finance Law of New York, Sec. 95.

§1408 Verification.

Any report required to be verified by this chapter shall be verified, if made by a person by such person, if made by a partnership by one of the members thereof, if made by an unincorporated association or private corporation by the president or by a vice-president and one other principal officer thereof, and if made by a public corporation by the chief fiscal officer thereof.

§1409. Payment for publication.

Any amount paid by a person to a newspaper or newspapers for any publication of names as required by this chapter shall be charged prorata against all abandoned property held or owing by such person at the time of such publication, except abandoned property of individual amounts of less than ten dollars.

§1410. Designation of newspapers.

Any notice required by this chapter shall be published in such newspapers as shall be designated by the state comptroller, except that in no case shall a notice be published in a newspaper other than one specified in the section requiring such publication.

§1411. Waiver of publication.

The state comptroller may waive the publication of any notice required by this chapter, except a notice required

by section fourteen hundred two, whenever in his opinion the cost of publishing such notice would be unreasonable in relation to the amount of abandoned property.

§1412. Penalty for failure to report or file.

Any person failing to make any report or to file any affidavit required by this chapter shall forfeit to the people of the state the sum of one hundred dollars for each day such report or affidavit shall be delayed or withheld, except that the state comptroller may extend the time for making any such report or filing any such affidavit and may waive the payment of any penalty or part thereof provided for by this section.

§1413. Penalty for fraudulent returns.

The making of a willful false oath in any report required under the provisions of this chapter shall be perjury and punishable as such according to law.

§1501. Constitutionality.

If any part, provision or section of this chapter, or the application of any such part, provision or section in any particular respect, shall be adjudged by any court of competent jurisdiction to be unconstitutional or ineffective in whole or in part, such judgment shall be confined in its operation to the particular provision or section or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect, impair or invalidate the remainder of such provisions or sections or their application in other respects; and to the extent that such provisions or sections are not unconstitutional or ineffective, they shall remain in full force and effect.

APPENDIX B.

History of Statutes Attempting to Escheat Life Insurance Policies.

Pennsylvania

The first statute of this kind was enacted by Pennsylvania in 1937 (Act of 1937, June 25, Pamphlet Laws 2063). Some minor amendments were made in 1939 (Act of 1939, June 24, Pamphlet Laws 660). The statute may also be found in Purdon's Pennsylvania Statutes, Title 27, Sec. 434, *et seq.*

This statute applies to policies issued by companies incorporated in Pennsylvania, regardless of whether the insured was a resident of Pennsylvania and regardless of where the policy was delivered.

It preceded by two years the New York statute, which was limited to domestic companies until the amendment of 1944, whereby New York attempts to escheat policies issued by companies incorporated in Pennsylvania and other States, if the insured resided in New York when the policy was issued, and if (as construed by the New York Court of Appeals) the policy was delivered in New York. Both States claim jurisdiction to escheat such policies.

The pertinent provisions of the Pennsylvania Statute are as follows (Act of 1937, June 25, Pamphlet Laws 2063; Purdon's Penn. Stat., Title 27, Section 434 *et seq.*):

> "Section 2". (Purdon's 435) "Definitions. * * * 'Company'. The word company shall include * * * insurance * * * corporations * * * incorporated * * * under the laws of this Commonwealth * * *."
>
> * * *
>
> "Section 3". (Purdon's 436a 3) "* * * Every company shall make a report of the proceeds of any policy of life * * * insurance awaiting due proof for payment,

or the surrender values of policies which have been surrendered by the policyholder or insured, or have been surrendered or are surrenderable at the option of the insurer under the contractual agreement between the insurer and the insured, * * * which have been held and are owing by any company, as hereinabove defined, and have been unclaimed by and unpaid to the lawful owner thereof, or to the person or persons legally entitled thereto, for seven or more successive years * * *"

* * *

Provisions are also made for publication for claimants (Section 5; Purdon's 438), and for escheat by court proceedings (Section 8; Purdon's 441), and an alternative procedure for payment to the State without legal proceedings (Section 9; Purdon's 442).

New York

In 1939 New York first enacted such a statute (Chapter 923 of the Laws of 1939, which added Sections 295-299 to the Insurance Law of New York, and added Section 44[h] to the State Finance Law).

It applied to policies issued by companies incorporated in New York, regardless of where the insureds resided or where the policies were delivered. It did not apply to companies incorporated in other States.

The New York Life Insurance Company attacked the statute as unconstitutional and obtained an injunction pendente lite. (*New York Life* v. *Pink et al.*, N. Y. Law Journal, December 21, 1939, p. 2257, N. Y. Supreme Court, N. Y. County, Special Term, Part III, McCook, J.; not officially reported. Mr. Justice McCook's opinion did not pass upon the constitutionality of the act but merely held that it was sufficiently doubtful to justify the preliminary injunction.)

Before that case was tried, the statute was amended (Chapter 602 of the Laws of 1940), whereupon the case was

discontinued. The amendment limited the statute to policies issued by New York companies upon the lives of residents of New York. It still applied only to domestic companies.

In 1943 the statutes mentioned were repealed and re-enacted in substance as Article VII of the Abandoned Property Law (by Chapter 697 of the Laws of 1943). It still applied only to domestic companies. Other portions of the Abandoned Property Law, which is a codification of various New York statutes relating to escheat, cover real property and many types of unclaimed personal property, including deposits in banks and courts located in this State. Only the provisions as to life insurance apply to companies incorporated in other States, and attempt to escheat conditional contracts, as distinguished from debts or deposits, and to take jurisdiction of property located in other States.

Not until 1944 was there any attempt to make the statute applicable to foreign life insurance companies. This was done by the statutes which are attacked in the case at bar as unconstitutional (Chapters 498 [Sec. 2] and 497 of the Laws of 1944, amending Chapter 697 of the Laws of 1943, copies of the pertinent provisions being set forth in Appendix A).

At the next session of the legislature, in 1945, a bill was passed to repeal the 1944 amendments and limit the statute, as before, to domestic companies (Assembly Introductory No. 2268, Print No. 2551), but the Governor vetoed the bill for other reasons, particularly a clause, opposed by the domestic companies, which would have made the statute applicable, as originally, to any such policies issued by domestic companies regardless of whether they were delivered in New York or elsewhere.

Shortly after the veto the suit at bar was commenced on June 9, 1945. The plaintiffs moved for an injunction

pendente lite whereupon the defendant agreed to postpone enforcement of the statute as against foreign companies pending the outcome of the case.

New Jersey

The New Jersey statute enacted in 1946 (Ch. 154 of the Laws of 1946, approved April 25, 1946; revised statutes 17:34-49 *et seq.*) is essentially a copy of the New York statute except that it is limited to domestic companies, i.e. "any life insurance company incorporated under the laws of this state", and is further limited to policies "issued on the application of a resident of this state * * * and which are payable to any person whose last known address according to the company's records is within this state" (R. S. 17:34-49).

Massachusetts

The Massachusetts statute also enacted in 1946 (Ch. 455 of Laws of 1946, approved June 6, 1946; General Laws of Massachusetts, Tercentenary Ed., Ch. 175, Secs. 149[a], [b], [c] and [d]) is essentially a copy of the New York statute except that it is limited to "domestic" companies.

Connecticut

A recent Connecticut statute, Public Act 508 of 1947, provides for the escheat of tangible and intangible property generally, but exempts "the proceeds of life insurance policies awaiting the happening of a contingency upon the happening of which such proceeds shall become payable, or surrender values of policies, or portions of premiums held to the credit of policyholders by life insurance companies having no capital stock" (Sec. 8). It allows the owners of escheated property to assert claims against the State (Sec. 4).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 337

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, NATIONAL LIFE INSURANCE COMPANY, PENN MUTUAL LIFE INSURANCE COMPANY, and PHOENIX MUTUAL LIFE INSURANCE COMPANY (Original Plaintiffs); and AETNA LIFE INSURANCE COMPANY, THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA, and THE UNION MUTUAL LIFE INSURANCE COMPANY (Plaintiffs Added by Stipulation),

Appellants,

v.

FRANK C. MOORE, Comptroller of the State of New York,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR APPELLANTS

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Appeal is from New York Court of Appeals. The appeal is from the judgment of the Court of Appeals of the State of New York (R. 59-60), the highest Court of the State. It is a final judgment which leaves nothing to be done by the lower Court except the ministerial act of entering an order accordingly (Jurisdictional Statement, pp. 10-11), which was done (R. 67). The judgment of the Court of Appeals is the final judgment reviewable here (*Department of Banking* v. *Pink*, 317 U. S. 264).

All Facts Conceded. All of the facts stated in the complaint (R. 4-35) were conceded in open Court when the case was heard in the Court of first instance (R. 2-3). The answer is to be disregarded as superseded by the concession of facts.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 337

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, NATIONAL LIFE INSURANCE COMPANY, PENN MUTUAL LIFE INSURANCE COMPANY, and PHOENIX MUTUAL LIFE INSURANCE COMPANY (Original Plaintiffs); and AETNA LIFE INSURANCE COMPANY, THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA, and THE UNION MUTUAL LIFE INSURANCE COMPANY (Plaintiffs Added by Stipulation),

Appellants,

v.

FRANK C. MOORE, Comptroller of the State of New York,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF FOR APPELLANTS

Escheat Inapplicable to the Policies

Escheat inapplicable to unperformed conditional life insurance policies as distinguished from recognized, liquidated and unconditional debts such as deposits in banks, courts, utility companies, etc.

The cases cited by appellee all involve recognized liquidated debts payable to someone upon mere demand, such as deposits in banks (*Anderson National Bank* v. *Luckett*, 321 U. S. 233; *Security Bank* v. *California*, 263 U. S. 282; *Provident Institution for Savings* v. *Malone*, 221 U. S. 660); deposits in Courts (*U. S.* v. *Klein*, 303 U. S. 618);

deposits with utility companies (*Brooklyn Borough Gas Co.* v. *Bennett*, 154 Misc. [N. Y.] 106); and unclaimed corporate dividends (*In re Philadelphia Electric Company*, 352 Pa. 457).

As stated in the *Anderson* case, a deposit "gives the bank merely the right to use the depositor's money until called for by him" (p. 286).

Life insurance, however, is a conditional contract both as to liability and amount of liability. It is not a matter of depositing a dollar and getting a dollar back. It is an association of many persons, some of whom will get back many times what they have paid, and others less, according to their length of life, age, cause of death, etc. It is a business of risks, a method of sharing the losses. Its investment features are inseparably intertwined with the conditional nature of insurance. These conditions are contracts which the Constitution forbids any State to impair (cases cited in our main brief, pp. 22-4).

Legally the position of the companies seems unassailable. They want only to have the terms of their contracts respected.

Equitably the rights of the companies and all of their policyholders to any savings which may come from so-called abandoned policies seems far superior to that of the New York public which has contributed nothing to the insurance assets out of which the payments would come, or to the losses on other policies.

No debt to escheat because proof of death, age, etc., is a condition precedent to liability.

It is conceded that these policies all provide that they are payable only upon due proof of death, age, etc. (R. 6-7, 14, 17, 65); that no such proof has been furnished (R. 14, 17, 52, 65); that nothing is held owing or payable

in fact (R. 14, 17); and that in the absence of such proofs it is impossible to determine the facts as to death, or how death occurred, or the correct age, etc. (R. 8, 14, 17); all of which affect the question of liability and amount of liability under the various conditions of the policies, the terms of which are conceded (R. 8, 9, 14, 17; and described in our main brief, pp. 3-4).

Law settled that proofs are condition precedent to liability.

As to the law, all of the authorities, including the cases cited by appellee, hold that nothing is owing under these policies unless and until the proofs required by their terms have been furnished to the insurance companies.

Appellee cites (at p. 17) *Wachtel* v. *Equitable Life*, 266 N. Y. 345, a leading case which holds that "proof of death * * * is a condition precedent to liability" (p. 350) and "till such proof was given * * * no liability * * * could arise" (p. 352).

Other leading cases are all to the same effect.

Bergholm v. *Peoria Life*, 284 U. S. 489, also holds that "the obligation of the contract does not rest upon the existence of the disability; but it is the receipt by the company of *proof* of the disability which is definitely made a condition precedent to * * * payment" (pp. 491-2), and "to discharge the insured from the legal consequences of a failure to comply with an explicitly stipulated requirement of the policy, constituting a condition precedent * * * would be to vary the plain terms of a contract in utter disregard of long settled principles" (p. 492).

O'Reilly v. *Guardian Mutual*, 60 N. Y. 169, also holds that there is no liability unless and until due proofs are furnished, the purpose of the provision being to enable the insurer "intelligently to form some estimate of his rights and liabilities before he is required to pay" (p. 173).

Nothing to contrary cited by appellee.

Appellee fails to cite a single case to the contrary. Some of the cases cited by appellee are entirely irrelevant and the others confirm appellants' contentions.

Reed v. *The Provident, etc., Society,* 190 N. Y. 111 (appellee's brief, p. 11), involved the question of whether the beneficiary had an insurable interest. Proofs of death *had* been furnished to the insurance company, and it appears that all the conditions of the policy had been performed (see p. 114). The policy was not payable upon death but upon due proof of death.

Burnet v. *Wells,* 289 U. S. 670 (appellee's brief, p. 11), was an income tax case which does not contain anything about proofs of death, age, etc., or as to when a policy becomes due, or anything else relevant to the case at bar.

Central Bank of Washington v. *Hume,* 128 U. S. 195 (appellee's brief, pp. 11-12), is equally devoid of anything pertinent here. It was simply a controversy between the beneficiary and her husband's creditors over the proceeds of insurance admittedly due (p. 199). It does not hold or even suggest that a policy is payable without due proof of death, age, etc., but, on the contrary, states that the company's duty is "to pay according to its terms" (p. 205).

McDonnell v. *The Mutual Life,* 131 App. Div. 643 (appellee's brief, p. 12), does not hold that a policy is payable upon the death of the insured, without more. On the contrary, the opinion states that the beneficiary *had* furnished proofs of death. An interesting feature of this case is that if the insured had lived 11 days longer the policy would have yielded a "15 year dividend" equal to nearly 50% of the face amount of the policy, illustrating the importance of proofs in determining how much, if anything, is due upon a policy. As the court pointed out "the rela-

tion of a policyholder to an insurance company is purely contractual" and although premiums had been paid for nearly 15 years, the court could not alter the contract.

Anderberg v. *Metropolitan Life*, 269 App. Div. 640 (cited at p. 12 of appellee's brief), involved an endowment policy which also contained provisions for an additional accidental death benefit. The court held merely that the accidental death coverage did not continue after the endowment period. It did *not* hold that a policyholder or beneficiary need not file proofs of survival or of death and comply with the other conditions of the policy.

New York Life v. *Federal Natl. Bank*, 151 F. 2d 537, cert. denied 327 U. S. 778, reh. denied 327 U. S. 816 (appellee's brief, p. 12), held that when due proofs of death *had* been furnished and the insurer had paid in good faith to the assignee of the policy, the insurer could not be forced to pay twice upon the ground that the insured was incompetent when he made the assignment. It also refers to a clause in the policy reading, "The company assumes no responsibility for the validity of any assignment" (p. 540), and points out that if the company were "compelled to carefully investigate" each assignment it "would place an impossible burden upon the company" (p. 541). In the case at bar the statute and decision below seek to saddle the companies with the "impossible burden" of determining, in the absence of the proofs required by the terms of the policies, whether these policyholders are living or dead, the cause of death, the correct age, etc. (R. 8, 14, 17)—burdens which, for obvious reasons, they never assumed, having lawfully contracted that payment was conditioned upon due proofs of the facts being furnished to them (R. 6-7, 14, 17, 65).

Pape v. *Home Ins. Co.*, 139 F. 2d 231 (appellee's brief, p. 13), has no relevancy that we can see. It involved insurance against confiscation of cotton during the Spanish civil war in 1936.

Van Saun v. *Metropolitan Life*, 135 Misc. 855 (appellee's brief, p. 13), sustains the insurer's right to contest a policy for misrepresentations in the application.

McCaffry v. *Metropolitan Life Insurance Company*, 172 Misc. 252, aff'd 261 App. Div. 452, aff'd 287 N. Y. 704 (appellee's brief, p. 16), held that proof of death was "a condition precedent to recovery" and that "due proof of death would comprise any fact relevant to the fact of death and the identity of the insured and questions directed to these particulars are proper and should be answered by the claimant, the physician, or any other person."

Buffalo, etc., Safe Deposit Co. v. *Knights, etc., Assn.*, 126 N. Y. 450 (appellee's brief, p. 16), also held that proof of death was a condition precedent to liability and that this condition "entitled the association to demand that the fact of death should be shown with reasonable definiteness and certainty, and if the proofs furnished failed to satisfy the association of the fact of the death, the association acting reasonably and in good faith could require further evidence."

McNally v. *Phoenix Ins. Co.*, 137 N. Y. 389 (appellee's brief, p. 17), shows that proofs of loss under a fire policy had been furnished within 10 days after the fire (p. 399) and the question involved was whether the proofs were adequate. The Court said that the "plaintiffs were doubtless bound to furnish them" (proofs of loss) "within a reasonable time * * *."

Commercial Casualty Ins. Co. v. *Stinson*, 111 F. 2d 63, cert. denied 311 U. S. 667 (appellee's brief, p. 17), held that proofs of accidental death were required and were a condition precedent to liability (p. 68, n. 12-14). The "proofs furnished * * * tended to establish her claim * * * that accidental death had occurred * * *" (p. 68, n. 12-14).

Lampert v. *John Hancock Mutual Life Ins. Co.*, 28 F. Supp. 142, aff'd no op. 107 F. 2d 1016, cert. denied 309 U. S. 663 (appellee's brief, p. 17), holds that due proof is a condition precedent to liability and that "the purpose of the policy provision requiring due proof of death is to give the insurance company basis to form an estimate of its liability before being obliged to pay" (p. 143, n. 1). In that case the proofs showed that the insured "jumped or fell from the Washington Bridge" (p. 143).

Companies deprived of all defenses, and of all right and opportunity to consider and investigate claims, or to adjust doubtful claims, etc.

The backbone of the insurance contract is the right to receive, consider and investigate claims, and to resist unjust claims, and to adjust doubtful claims. These rights are safeguarded by a vital provision in the policies that nothing is payable until due proof is furnished to the insurance company (R. 6-7, 14, 17, 65). This statute breaks that provision, upon which all of the other rights depend (R. 12, 65-6, 60, 52; our main brief, p. 6).

The Court of Appeals concedes that the companies are entitled to raise most defenses *except* the requirement of due proof (R. 66) but the concession is a hollow gesture indeed where the conceded facts show that it is utterly impossible to determine what defenses, if any, may apply to any particular policy until the proofs are received (R. 14).

That is an "inconvenience" the Court of Appeals concedes, but it sees no constitutional violation (R. 66). We think that the violation is the impairing of the provision for due proofs, which assures all of the other rights.

If the provision for due proofs is respected the companies will not be put in the absurd and impossible position of being called upon to determine, prematurely and hypotheti-

cally, whether any defenses, total or partial, may exist to any particular policy.

Were it possible to find out what has happened to these missing policyholders (whether they are dead, how they died, and their correct age, etc.) why should not the *State* be required to furnish proofs before collecting? How does the State get any greater rights than the policyholder or beneficiary?

The cases cited by appellee give no support to the theory that those rights can be brushed aside without violating the impairment and due process mandates of the Constitution.

People ex rel. Ryan v. *Lynch*, 262 N. Y. 1 (appellee's brief, p. 14) held that an appeal could not be taken, as a matter of right, to the New York Court of Appeals from a unanimous decision of the Appellate Division, where no constitutional question was presented, the issue being whether the appellant was a "resident" under the New York Income Tax Law, the Appellate Division having determined that he was a resident on the facts presented.

Guardian Life v. *Graves*, 268 App. Div. 809, affirmed without opinion at 294 N. Y. 953 (appellee's brief, p. 14), was an action to construe a premium tax law and was dismissed as "academic", there being no actual controversy over any taxes due or claimed by the State. No constitutional question was involved, and no danger of immediate or irreparable damage was apparent.

Carolene Products Co. v. *United States*, 323 U. S. 18 (appellee's brief, p. 14) held that a Federal act prohibiting shipment of "filled milk" in interstate commerce is constitutional.

Presumptions and burden of proof as to age; suicide, etc., are rules of evidence, not of themslves determinative of substantive rights.

The presumptions regarding age, suicide, etc., and the burden of proving certain defenses, are rules of evidence and procedure for the courtroom. If they were determinative of substantive rights, as suggested in appellee's brief (pp. 15-16), they would nullify most of the policy provisions—which is exactly what the statute does, with the help of the construction put upon it by the appellee and the courts below. None of the cases cited by appellee support such a result.

Incontestability clauses do not relate to coverage, but only to whether a policy was valid in its inception.

The fact that a policy may have been in force for a specified number of years may sometimes, under the so-called incontestable clause, prevent a contest as to whether the policy was valid in its inception. It does not mean that the policy must be paid in full regardless of age, cause of death, etc. (*Metropolitan Life* v. *Conway*, 252 N. Y. 449.)

Statute writes new terms into old policies.

Since this act is in no sense regulation, or an exercise of police power, the State could not properly insist upon writing escheat provisions into new policies. Here it writes new terms into old policies (simultaneously destroying the old terms), under the retroactive construction placed upon the act by the Court of Appeals (R. 65-6; 17). This clearly violates the impairment and due process clauses of the Constitution (*Lynch* v. *United States*, 292 U. S. 571, *Boswell* v. *Security Mutual*, 193 N. Y. 465, and others cited in our main brief at pp. 22-3).

Whether it is called an "escheat" or "custodial" act is unimportant.

Appellee frequently refers to the statute as "custodial", but the name is not important. Actually the State uses the money for its own purposes (R. 29-30; N. Y. State Finance Law, Sec. 95). Obviously it does not anticipate that many of the so-called missing policyholders will ever appear, and if some do the State is completely indifferent as to whether the rights of the companies, under the terms of the policies, are protected in any way—indeed the State could not resist any claim, no matter how unjust, without admitting that it never had any right to escheat in the first place (our main brief, pp. 21-2).

The State demands the full face amount of these policies, yet it is obvious that under many of these policies the full amount would never be justly payable if the true facts were known. It is equally obvious, indeed conceded, that it is impossible to ascertain the true facts in the absence of the proofs required by the policies (R. 14).

Amendment adding § 707 does not cure the statute.

Section 707 (our main brief, p. 41; appellee's brief, p. 32) was added (at the suggestion of the Attorney General, not the appellants), after this suit was commenced, but before it was heard. It says that after the insurance company has paid to New York, it may then pay *again* to any claimant who appears, whereupon the company becomes subrogated to the claimant's rights against the State.

It does not reimburse the company if another state has jurisdiction to escheat. It does not reimburse if the company pays $10,000 to the State, and it later develops that the claimant is only entitled to $5,000, or perhaps nothing, since the State keeps the difference—which never should have been taken from the company in the first place. It

does not reimburse the company for the cost of advertising and the service charge deducted by the State (Secs. 1407, 1409, R. 29-30).

Why New York companies are not attacking the act at present.

Why the New York companies are not presently attacking the statute is explained in our main brief (pp. 48-9). They did attack it in the *New York Life* case in 1939 which was discontinued after the legislative amendment of 1940. It is not correct to suggest that they consider the act constitutional. However, this has no legitimate bearing upon the suit at bar by the foreign companies, which promptly attacked the act after the amendment of 1944 and the Governor's veto of the repeal bill (our main brief, pp. 48-50).

Statutes of limitation abrogated and barred claims revived.

All statutes of limitation applicable to these policies are nullified by the statute (Sec. 1400; R. 27). This objection was raised below because the constitutionality of reviving barred claims had not been settled in New York (*Hopkins* v. *Lincoln Trust Co.*, 233 N. Y. 213; *Robinson* v. *Robins Dry Dock & Repair Co.*, 238 N. Y. 271). The Court of Appeals held in the case at bar that they could be revived (R. 66). The question has not been urged upon this appeal because we suppose that the Court will not consider it a Federal question in view of its holding in *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304.

New York Lacks Jurisdiction

Even the New York Legislature agrees that the State of incorporation (domicile) of the insurance company is the proper jurisdiction.

The statute, as originally enacted in 1939, based jurisdiction upon the State of incorporation (the domicile) of the insurance company, and applied to all so-called abandoned policies issued by New York companies regardless of the residence of the insured when the policy was issued or the place of delivery (our main brief, p. 48).

The New York Life Insurance Company attacked the act as unconstitutional but discontinued its suit when, in 1940, the Legislature amended the act so as to limit it to policies issued by New York companies upon the lives of residents of New York (our main brief, pp. 48-9). It still applied only to domestic companies (our main brief, p. 49).

In 1944, for the first time, the act was extended to foreign companies by the amendment which resulted in the suit at bar. At the next session of the Legislature, a bill was passed repealing the amendment, but was vetoed by the Governor, *not* because he disapproved of eliminating the foreign companies, but because the bill contained other provisions (objected to by the New York companies), basing jurisdiction upon the domicile of the insurance company, as originally provided in 1939 (our main brief, pp. 48-50).

Thus both the original and also the latest expressions of the Legislature accord jurisdiction to the State in which the insurance company was incorporated.

The amendment of 1944, extending the act to foreign companies is in the statute books only because the bill repealing it was vetoed for *other reasons*.

While there seems to be a difference of opinion between the Legislature and the Governor as to whether New York

should limit the act to policies issued upon the lives of residents of New York, both the Legislature and the Governor agree that the statute should not apply to foreign life insurance companies (our main brief, p. 49).

The amendment of 1944, the cause of this suit, stays on the books only because the Governor could not approve part of the repeal bill and veto the rest of it (our main brief, p. 49).

Unlike taxation, attachment, regulation, etc., jurisdiction to escheat can be only in one State.

Appellee cites, with emphasis (p. 18) *International Shoe Co.* v. *Washington,* 326 U. S. 310, which holds that corporations may be subjected to unemployment taxes in every State where they are doing business. Obviously the same policy cannot escheat to each of the many States in which each of these companies is doing business (R. 5).

In the same category are *Curry* v. *McCanless,* 307 U. S. 357, holding that two States may impose death taxes in some circumstances; *Hoopeston Co.* v. *Cullen,* 318 U. S. 313, sustaining State licensing requirements and regulations; *New England Mutual* v. *Woodworth,* 111 U. S. 138, sustaining the appointment of an administrator for a deceased policyholder in any State where the insurance company could be served with process; *Comey* v. *United Surety,* 217 N. Y. 268, holding that a insurer licensed in New York was not absent from the State for the purpose of its statute of limitations; *Morgan* v. *Mutual Benefit,* 189 N. Y. 447, which, stripped of *dicta,* merely held that service by publication could be made in any State where the insurance company was subject to process, citing *Harris* v. *Balk,* 198 U. S. 215, which held that a debt could be attached wherever the debtor can be served with process, as this does not expose the debtor to multiple liability because the first attachment reduces the debt pro tanto.

These cases show that for *some* purposes a debt has a situs in every State where the debtor can be served with process. This test has never been applied to escheat for the obvious reason that the same property cannot escheat to more than one State.

Abandoned property cases all give jurisdiction to domicile of the obligor.

All of the abandoned property cases (such as the *Anderson National*, the *Security Bank*, *Provident Institution*, *Brooklyn Gas Co.*, and *Philadelphia Electric* cases cited at pages 1-2 of this brief, and at page 9 of appellee's brief) give jurisdiction to the State where the obligor is incorporated (its domicile). That is where the contracts are payable and where the assets behind the contracts are located, as in the case at bar (R. 6-7). As to abandoned deposits in courts, the State where the court is located has jurisdiction to escheat (the *Klein* cases cited at page 1 of this brief, and at page 10 of appellee's brief).

Domicile of supposed obligee unknown and immaterial.

In none of these cases was the residence of the obligee considered material, and, of course, it was almost always unknown, and impossible to determine, as in the case at bar (R. 50, 9-10, 17, 44).

It should be noted that the statute at bar is not even concerned with the *present* domicile of the supposed *obligee*, but the domicile, *many years ago*, of the *insured*, who may never have had the slightest interest in the policy (R. 8-9, 14, 19; p. 31 of our main brief), and certainly has none now if the policy is to escheat because of his supposed death. In any event, the domicile of either, at either time, is unknown and virtually impossible to determine (R. 50, 9-10, 17, 44; p. 31 of our main brief).

Domicile of the insurance company is the only known jurisdictional factor.

Both sides cite *Severnoe Securities* v. *L. & L. Ins. Co.*, 255 N. Y. 120 (our main brief, p. 29, and appellee's brief, pp. 18-9). It holds that the three customary tests in determining situs and jurisdiction of debts (if such these be) are (1) the domicile of the creditor (which is unknown here), or (2) the domicile of the obligor (which *is known*, and *never changes*, being the home office of the insurance company in its State of incorporation), or (3) any place where the obligor can be found (which is obviously impractical since the same policies cannot escheat in each of the many States where these companies do business).

As Judge Cardozo said in the opinion, the choice is to be based upon "a common-sense appraisal of the requirements of justice and convenience in particular conditions" (p. 123). The State of incorporation (the domicile) of the insurance company seems to be the only choice available, and it is in accord with the many legal and practical considerations outlined in our main brief (pp. 26-33).

Escheat of abandoned accounts traditionally limited to domestic corporations.

That jurisdiction to escheat intangibles such as abandoned bank accounts, and other deposits, and unclaimed corporate dividends, etc., has always been deemed to be in the State where the debtor corporation is domiciled is indicated by the fact that no State has attempted to escheat accounts in banks or other corporations incorporated in other States. This is so in New York except as to life insurance policies (R. 11), and even as to these it was so until the amendment of 1944, and still would be so if the 1945 bill repealing the amendment had not been vetoed *for other reasons* (R. 10; also our main brief, p. 49).

Other States which have adopted such legislation have all limited it to domestic companies (our main brief, pp. 47 et seq.). This is all indicative of a strong general feeling that, in respect to escheat of corporate obligations, each State should confine its jurisdiction to domestic companies, in line with the rule applicable to real property and tangible personal property that such jurisdiction should be limited to property within its territorial limits.

Conflict with Pennsylvania statute.

The Pennsylvania statute (our main brief, pp. 47-8) appears to be limited to Pennsylvania companies and apparently applies to all so-called abandoned policies of Pennsylvania companies regardless of whether the policies were delivered in New York or elsewhere, and regardless of where the insured resided when the policies were issued. It does not mention foreign insurance companies, and has never been applied to them. In the courts below the appellee apparently agreed with us that this conflict existed.

As only one State can have jurisdiction to escheat the same property, it is proper to consider all factors, including the rights of other States.

In any event, the jurisdictional question here is whether New York has jurisdiction, and since jurisdiction to escheat can only be in one State, a decision either way by this Court would probably set the jurisdictional mold for all escheat legislation of this type, if policies of this kind are subject to escheat. Accordingly, it is proper to consider whether the State of incorporation or some other State would have a superior claim to jurisdiction, and all of the other legal, factual, and practical factors involved.

Weighty factors, we think, are that the original New York act, and also the 1945 bill vetoed by the Governor, and apparently the Pennsylvania act, accorded jurisdiction

to the State of incorporation (domicile) of the insurance company, which seems to be the only practical rule. It is also significant that Massachusetts, New Jersey, and apparently Connecticut have confined their legislation to domestic companies (our main brief, pp. 47-50).

The economy and practicability of dealing with one State instead of 48 on this particular subject is important. It would save the companies, and their policyholders generally, the cost of setting up staffs to deal with 48 State laws, each with its own regulations and elaborate report forms, etc., costing perhaps more than the amount of the policies involved.

As to the missing policyholders, the money (if it is to be taken from the insurance companies and their policyholders generally) would be as safe as anywhere in the custody of the State of incorporation which, after all, is where the policyholder put his insurance.

That New York has complete faith in the integrity of the States in which the companies are incorporated is shown by the fact that New York lets their home States hold the security deposits required of all companies (N. Y. Insurance Law, Sec. 103).

No "moot" contentions are made.

Appellee suggests (pp. 28-9) that some of our jurisdictional arguments are "moot", "apprehensive", etc. We see none of that type. In dealing with jurisdiction to escheat, where only one State can have jurisdiction, it is necessary to consider the legal and practical factors, and their probable effect (our main brief, pp. 26-32).

None of the cases cited by appellee are to the contrary.

Anniston Mfg. Co. v. *Davis*, 301 U. S. 337 (appellee's brief, p. 28) holds that a Federal processing tax may properly provide that any refund must be claimed by the person who bore the tax, and that if the manufacturer passed the burden of the tax on to purchasers the purchasers should claim the refund. It was also held that the manufacturer might be entitled to relief if it were impossible to determine who had borne the burden of the tax.

Hodge Drive-It-Yourself Co. v. *Cincinnati*, 284 U. S. 335 (appellee's brief, p. 28) holds that an ordinance which requires companies renting "drive-it-yourself" automobiles to post a bond to protect the public against injuries resulting from negligent operation of the cars was a constitutional exercise of the State's police power, the operation of such cars being extra-hazardous to the public.

California v. *San Pablo & Tulare R. R. Co.*, 149 U. S. 308 (appellee's brief, p. 28) held that this Court would not hear California's claim for taxes after the taxes had been paid and the claim "extinguished", the only purpose of continuing the case being to get an advisory ruling on "moot" questions.

Waite v. *Dowley*, 94 U. S. 527 (appellee's brief, p. 29) held that a town in which a national bank was located could tax shares of the bank held by residents of the town, but that the Court was not called upon to decide whether other towns in which shareholders resided could levy such taxes, because the question had not been raised and was not necessary to the decision.

Rescue Army v. *Municipal Court*, 331 U. S. 549 (appellee's brief, p. 29), dismissed an appeal because the constitutional questions were not presented with sufficient clarity to enable the Court properly to pass upon them.

The constitutional rights of the companies and of all their policyholders are involved.

Appellee is mistaken in suggesting that we are urging the rights of any missing policyholders as such. We urge the rights of the companies, and of *all* of their policyholders, for what hurts the companies hurts them.

The cases cited by appellee seem far afield.

Tileston v. *Ullman*, 318 U. S. 44 (appellee's brief, p. 29) held that the patient, not her physician, was the proper party to complain if a statute forbidding contraceptives endangered her constitutional right to life.

Voeller v. *Neilston Warehouse Co.*, 311 U. S. 531 (appellee's brief, p. 29) holds (1) that a corporation is sufficiently representative of its majority stockholders to raise a constitutional issue on their behalf; and (2) that a notice, objecting to the sale of the corporate assets, given by dissenting stockholders to the corporation is notice to the majority stockholders.

McCabe v. *A. T. & S. F. Ry. Co.*, 235 U. S. 151 (appellee's brief, p. 29) held that an injunction was properly refused where there was no showing that the plaintiffs lacked an adequate remedy at law and where it did not appear that the railroad planned to discriminate against persons of any color.

Appellants are not constructively New York corporations merely because they do business there.

Throughout the appellee's brief there is the constant suggestion, unsupported in fact or law, that the appellants are really New York corporations, and were only "originally incorporated" in other States and that these policies were issued by New York "agencies" or "branches" which have taken on the attributes of domestic New York companies.

The conceded facts are that the appellants are incorporated in other States and their business is located and transacted at their home offices in other States, except for the solicitation of insurance by local agents, who do not write insurance, or pay claims, or in any way manage the business (R. 5-7). All of the policies are written and issued at the home office, which is the place where all claims must be made, and are payable, under the terms of the policies, and where the officials and records of the companies, and the assets behind the policies, are located (R. 5-7).

The Court of first instance agreed that the domicile of the insurance company was the only sound and practical jurisdiction, but attempted to save the statute by giving the appellants a constructive domicile in New York (R. 43-51), a theory which was not followed by the Court of Appeals and is unsound in fact and in law.

Martine v. *International Life*, 53 N. Y. 339, and *Moscow Fire Ins. Co.* v. *Bank of New York*, 280 N. Y. 286 (cited in appellant's brief at pp. 24-5), have no application whatsoever, and were not adopted by the Court of Appeals as applicable here. The *Martine* case involved an English company which had a New York branch which was in all respects a distinct organization which issued insurance and paid claims, etc., and had its own board of directors and officers, and functioned entirely independently of the parent company. The *Moscow Fire* case held that New York had jurisdiction over securities deposited in New York by the New York branch of a Russian insurance company, which branch was "a complete and separate organization" (p. 309 et seq.) operating on local capital held by American trustees (p. 308), indeed an independent organization with "a definite separation and division of its property and even its juristic personality" (p. 309) from that of the parent company.

CONCLUSION

The judgment of the Court of Appeals of the State of New York should be reversed.

Respectfully,

GANSON J. BALDWIN
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December 16, 1947.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 337

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, NATIONAL LIFE INSURANCE COMPANY, PENN MUTUAL LIFE INSURANCE COMPANY, AND PHOENIX MUTUAL LIFE INSURANCE COMPANY (ORIGINAL PLAINTIFFS); AND AETNA LIFE INSURANCE COMPANY, THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA, THE UNION MUTUAL LIFE INSURANCE COMPANY, AND THE UNION LABOR LIFE INSURANCE COMPANY (PLAINTIFFS ADDED BY STIPULATION),

Plaintiffs-Appellants,

vs.

FRANK C. MOORE, COMPTROLLER OF THE STATE OF NEW YORK,

Defendant-Respondent

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO AFFIRM

MAY IT PLEASE THE COURT:

Now comes the appellee in the above entitled cause, Frank C. Moore, Comptroller of the State of New York, by

his counsel of record, the Attorney-General of the State of New York, and moves that the judgment appealed from be affirmed.

The motion to affirm is made upon the ground that the questions involved in this appeal are not substantial.

The appellee respectfully submits that the decisions set forth and discussed in the unanimous opinion rendered by the Court of Appeals in the instant case and accompanying the judgment appealed from, do well indicate that the questions upon which the decision of the instant cause depends are so unsubstantial as to need no further argument.

The said opinion of the Court of Appeals of the State of New York is reported in 297 New York 1 and is also attached as Exhibit D to appellants' "Statement as to Jurisdiction."

Dated, August 26, 1947.

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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1947

No. 337

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, NATIONAL LIFE INSURANCE CO., et al.,

Appellants,

against

FRANK C. MOORE, Comptroller of the State of New York,

Appellee.

BRIEF FOR APPELLEE

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Supreme Court of the United States

OCTOBER TERM, 1947

No. 337

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, NATIONAL LIFE INSURANCE CO., et al.,

Appellants,

against

FRANK C. MOORE, Comptroller of the State of New York,

Appellee.

BRIEF FOR APPELLEE

Statement

The appellants have appealed to this Court pursuant to U. S. Code, tit. 28, Sec. 344(a), from a final judgment of the Supreme Court of the State of New York, County of New York, dated July 24, 1947, and entered upon a remittitur from the Court of Appeals of the State of New York, in a declaratory judgment action attacking the constitutionality of the provisions of the Abandoned Property Law of the State of New York dealing with unclaimed life insurance funds, and seeking to restrain the State Comptroller from proceeding with the enforcement thereof.

Appellants (plaintiffs in the original action) are a group of life insurance companies chartered in states other than

New York but all licensed to and actually doing business in New York. They challenged the validity of the statute under the contract clause (Art. 1, Sec. 10), and the due process clause of the Fourteenth Amendment.

Upon motions made by both sides for a decision on the pleadings, Special Term of the State Supreme Court annulled the statute in so far as it pertains to policies of life insurance issued for delivery *outside* the State of New York, but upheld the challenged provisions in all other respects, except that the Court put aside an issue as to the alleged unlawful operation of the statute upon defenses which such companies might have to claims upon their insurance contracts (R. 36-55). The opinion rendered at Special Term is reported in 187 Misc. 1004, 65 N. Y. Supp. (2d) 143 [1946].

Upon appeal by the insurance companies to the Appellate Division of the Supreme Court, First Department, the judgment of Special Term was *unanimously* affirmed, without opinion (271 App. Div. 1002, 69 N. Y. Supp. (2d) 323 [1947]).

Upon further appeal by the insurance companies to the Court of Appeals, that court *unanimously* affirmed the ruling of the courts below as to the constitutionality of the statute, but modified the judgment below by striking out the reservation which had been made on the question as to whether the statute wrongfully does away with defenses which the companies might have to claims on their policies (R. 61-66). The opinion of the Court of Appeals is reported in 297 N. Y. 1, 74 N. E. (2d) 24 [1947].

The insurance companies have appealed to this Court as a matter of right. On October 20, 1947, this Court noted probable jurisdiction (R. 76).

Facts

The Statute.

The Abandoned Property Law of the State of New York (Consolidated Laws, chap. 1; McKinney's Consolidated Laws of New York, Book 2½)* sets up a mode of procedure whereby the State takes into its custody certain types of personal property as to which there has been a failure of title, or which has been actually abandoned or is presumed to be abandoned by lapse of time. The policy of the State, as set forth in Section 102 of the Law, is to take over and utilize such unclaimed property for the benefit of all of the people of the State, while at the same time protecting the interests of the owners thereof who may appear at a subsequent date.

The statute makes provision for the taking over by the State of unclaimed property held by banking organizations and utility and life insurance companies, as well as unclaimed funds on deposit in federal courts within the State, and unclaimed condemnation awards. The law sets up presumptions of failure of title or abandonment due to lapse of time and outlines the procedure under which such unclaimed funds are to be paid to the State. Put another way, the Legislature has by this act provided means for taking into the custody of the State certain funds actually or constructively in the territorial limits of the State and which are presumed by lapse of time to have been abandoned or to have suffered a failure of title, and to utilize the moneys for the benefit of all the people until claim is made by the true owner.

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* The pertinent provisions of the statute are printed in the Record as Exhibits "A" and "B" annexed to the Complaint (R. 21-35) and as "Appendix A" in appellants' brief. They were discussed and construed in both the opinions of Special Term and the Court of Appeals (R. 37-40; 61-62).

The specific portion of the statute here under attack is contained in Article VII thereof and pertains to unclaimed life insurance funds. The relevant sections of the particular Article and various general provisions contained in the statute and relating to life insurance funds, among others, may be summarized as follows.

The Act provides that certain unclaimed property held or owing by life insurance corporations shall be deemed to be abandoned property. Such property—as defined in Sec. 700 of the law—includes any moneys "held or owing" by any life insurance company which have remained unclaimed for seven years by the person or persons entitled thereto under (1) matured life insurance policies on the endowment plan issued on the lives of residents of New York, (2) other kinds of life insurance policies issued on the lives of residents of New York, where the insured, if living, would have attained the limiting age under the mortality table on which the reserves are based; or (3) life insurance policies issued on the lives of residents of New York who have actually died.

It is provided that on or before April first in each year, every life insurance corporation shall make a verified written report to the State Comptroller of all such abandoned property held or owing by it (Sec. 701). Within thirty days thereafter such corporation shall publish a newspaper notice to the persons appearing to be entitled to any of such unclaimed moneys together with a statement (1) that a list of the names of such persons is on file and open to public inspection at the principal office of the corporation; (2) that payment of such unclaimed moneys will be made on or before the succeeding August thirty-first to persons establishing their right thereto; and (3) that in the succeeding September such unclaimed moneys still remaining will be paid to the State Comptroller, after which the insurance companies shall cease

to be liable therefor (Sec. 702). Such payments shall be made to the State Comptroller at the time so fixed (Sec. 703). Thereupon the care and custody of such property shall pass to the State, the State shall be responsible for all claims established thereto pursuant to law less any lawful deductions, and the insurance companies shall be relieved of liabilify for any such claim (Sec. 1404). The State Comptroller shall publish annual statements of abandoned property received by him and not paid to claimants (Sec. 1402). Claims may be filed with him for such property and his determination thereof shall be subject to review in the courts (Sec. 1406). The statute shall be enforced notwithstanding the bar of any statute of limitations (Sec, 1400).

Subdivision (d) of Sec. 103 of the Abandoned Property Law defines a "life insurance corporation" within the meaning of and subject to the law as being "any insurer corporation organized under the laws of this state or any foreign corporation authorized to do either one or both kinds of insurance business authorized in paragraphs one and two of Section forty-six of the insurance law, as amended from time to time".

The State does not escheat these funds unto itself, but merely takes them into its custody; the Act makes full provision for the filing of claims and payment by the Comptroller as well as judicial review of his denial of any claim (Secs. 1406, 1407).

We might here note that appellants do not object to the method or procedure set up by the statute for the collection of the funds. Their complaint of unconstitutionality goes to the very right of the State to take into its custody those funds set forth in Section 700 as being deemed abandoned property.

Proceedings Below.

This action was instituted by a group of foreign* life insurance companies, all licensed to and doing business in New York in conformity with its Insurance Law, for a judgment declaring Article VII of the Abandoned Property Law to be unconstitutional as applied to such foreign life insurance companies and enjoining the State Comptroller from proceeding with the enforcement thereof.

No attack is made upon the statute by domestic companies.

After answer had been made to the complaint (R. 35-36), both sides moved for judgment on the pleadings.

At the hearing before Special Term, and in his brief to that court, the Comptroller conceded that although literally the law applied to all life insurance companies authorized to do business in New York, yet it must be construed as being intended to apply only to companies actually doing business in the State and to such policies as were written through domestic companies or duly licensed domestic (*i. e.*, New York) agencies of foreign companies, with the additional requirement that the assured be at the time of the writing of the policy a resident of New York (R. 47).

The Comptroller conceded that the statute did not apply to foreign companies which did not do business in New York, although authorized so to do, nor to policies written by a foreign branch of a foreign company, even though the assured was a resident of New York. In other words, in so far as foreign companies are concerned, the Comptroller conceded (and it has been so decided below), that the *statute applies only to the business done by them in New York, with residents of New York* (cf. *Mutual Life Insurance Co.* v. *Cohen*, 179 U. S. 262 [1900]).

* We apply the descriptive term "foreign" to the appellant companies in the sense that they were all incorporated in a state other than New York.

Special Term, in an exhaustive opinion (R. 36-55), found, as conceded by the Comptroller, that the statute was invalid in so far as it literally purported to apply to policies written outside of the State by foreign companies, but that it was wholly valid in its application to policies written through domestic agencies of foreign companies on the lives of New York residents. In effect, the court held that the proceeds of unclaimed or abandoned policies which "were written and/or delivered in New York by New York agencies of [foreign] companies and insured the lives of New York residents" (R. 51) were subject to being taken into custody by New York rather than by the state where the company was originally incorporated.

Special Term accordingly denied the Comptroller's motion for judgment on the pleadings in so far as the statute was claimed to be invalid as to policies written outside the State by foreign branches of foreign insurance companies, but granted the motion in all other respects.

As to the claim of the companies that they *may* possess various kinds of defenses to claims upon some of the policies and that the Act deprived them of such defenses, Special Term pointed out that the complaint did not state facts showing the existence of any defense to any specific policy, that "the fact that the companies may possess valid defenses to some of the policies does not render the statute unconstitutional, in so far as other policies are concerned to which there are no valid defenses," and that the proper remedy of the companies as to any policy to which they claim a whole or partial defense was to refuse to turn over the amount due on such policy and to bring such declaratory judgment actions as they might deem proper with respect thereto (R. 52-53). The judgment entered at Special Term accordingly recited that the decree was without prejudice to the right of the companies to assert that the law was unconstitutional in so far as it purported to deprive them of any total or partial defense to any specific policy (R. 3).

In order that there should be no question about the exact type of policy as to which Special Term held the law unconstitutional, counsel for both sides agreed on the language to be used in the judgment (without any concession by the companies as to the correctness of the decision by Special Term), which, as entered, adjudicates that the provisions of the Abandoned Property Law pertaining to life insurance companies are "unconstitutional and void in so far as they apply to policies of life insurance issued for delivery outside of the State of New York by foreign life insurance companies" (R. 2-3), and that except as so set forth, said provisions, in so far as under attack in this action, "are in all respects constitutional and valid" (R. 3).

Upon appeal by the insurance companies, the judgment rendered at Special Term was *unanimously* affirmed, without opinion, by the Appellate Division of the Supreme Court, First Department.

Upon further appeal by the insurance companies to the Court of Appeals, that court, in a *unanimous* opinion (R. 61-66), modified the judgment below by striking out the reservation made by Special Term as to the right of the companies to later assert that the law was unconstitutional in so far as it allegedly purported to deprive the companies of defenses which they might have to some policies, treated the question on its merits, and held that the statute leaves the companies wholly free to set up any defenses that they might have and to show that no moneys (or only some portion of the face amount) were "held or owing" (Sec. 700) on any particular policy. In all other respects the judgment of Special Term, as affirmed by the Appellate Division, was unanimously upheld.

The Question Presented

Basically, the only question which this appeal brings up for determination is whether the State of New York has the power to take into its custody as abandoned property moneys due on policies written on the lives of New York residents by domestic (New York) agencies of foreign life insurance companies and issued for delivery in New York. We respectfully submit that the *affirmative* answer unanimously given to this question by all the courts below should be affirmed by this Court.

POINT I

The constitutionality of custodial statutes such as the one in question is well established.

It is by now well settled that a state may compel surrender to it and take into its custody tangible or intangible personal property, actually or constructively in the territorial limits of the state, where there is substantial ground for belief that the fund has been abandoned, forgotten or otherwise left without private ownership.

Anderson National Bank v. *Luckett*, 321 U. S. 233 [1944] [Bank Deposits];

Security Bank v. *California*, 263 U. S. 282 [1923] [Bank Deposits];

Provident Institution for Savings v. *Malone*, 221 U. S. 660 [1911] [Bank Deposits];

Brooklyn Borough Gas Co. v. *Bennett*, 154 Misc. 106, 277 N. Y. Supp. 203 [1935] [Utility Deposits];

In re: Philadelphia Electric Company, 352 Pa. 457, 43 A. 2d 116 [1945] [Unclaimed corporate dividends].

The sovereign's right applies even to funds on deposit in the registry of a federal court situated within the state's boundaries.

United States v. *Klein*, 303 U. S. 276 [1938].

It is sufficient that the fund be constructively in the State's territorial limits.

United States v. *Klein*, 106 Fed. 2d 213 [1939]; certiorari denied, 308 U. S. 618.

Appellants present two main arguments in an effort to avoid the foregoing well-settled principles concerning the State's right to take abandoned personal property into its custody. Firstly, they contend that moneys due from them on policies and remaining unclaimed belong to the companies themselves, and are not debts or choses in action similar to bank or utility deposits; and, secondly, that although they do business in New York through domestic agencies under license from the Superintendent of Insurance and in conformity with the New York Insurance Law, yet because they were originally incorporated in a foreign state, these unclaimed funds, even if debts or choses in action, do not have their situs in New York and are not a proper subject for appropriation into the custody of the State.

We shall show in Points II and III hereinafter that these contentions are wholly untenable. In view of the exhaustive nature of the opinions of Special Term and the Court of Appeals with respect to both these arguments, we shall refrain as far as possible from being repetitious.

POINT II

The unclaimed funds covered by Section 700 of the Abandoned Property Law are not the property of the insurance companies, but are rather unclaimed liquidated debts due and owing from the companies to those insured or their beneficiaries.

As to the Nature of the Debt.

Generally speaking, the funds deemed by Sec. 700 to be abandoned property arise either out of endowment policies which have matured or other types of life insurance policies where the insured has actually been shown to have died or is presumed to have died, and no claim has been made to the proceeds for at least seven years. The policies are all in the category of those in which the insured has met all the obligations of the contract by him to be performed. The only thing which keeps the money in the hands of the insurance companies is that no claim has been made by the person entitled to receive the same.

A life insurance policy is a contract to pay a stated sum of money upon the death of the insured in consideration of certain payments duly made by him, or on his behalf, at fixed periods during his life (*Reed* v. *The Provident, etc., Society,* 190 N. Y. 111, 118; 82 N. E. 734 [1907]). It is a contract susceptible of ownership like any other chose in action. It is not insurance for a single year with a privilege of renewal from year to year by paying the annual premium, but rather an entire contract of insurance for life, subject to forfeiture for non-payment of premiums (*Burnet* v. *Wells,* 289 U. S. 670, 679 [1933]).

Life insurance "* * * is simply a contract, so far as the company is concerned, to pay a certain sum of money upon the occurrence of an event which is sure at some time to happen * * *" (*Central Bank of Washington* v. *Hume,*

128 U. S. 195, 205 [1888]). Immediately upon the happening of the event upon which the policy is conditioned—the maturity of an endowment policy or the death of the assured in a life policy—the insurance companies are unquestionably in the position of debtors for the stated amount to those so entitled to receive the proceeds of the policy.

Upon the death of the assured covered by a life insurance policy, the policy as such ceases to exist and there remains simply a liquidated debt for the amount of the policy. * * * The obligation to pay in accordance with the terms of the contract is in force, but the policy of life insurance is no longer in force. It has been transformed into a liquidated debt by the happening of the contingent event theretofore provided for." (*McDonnell* v. *The Mutual Life Insurance Company of N. Y.*, 131 App. Div. 643, 646; 116 N. Y. Supp. 35, 37 [1909]).

A fortiori, when an endowment policy matures, it becomes evidence of a debt due and owing the insured or those entitled to claim under him. It is no longer in existence as a policy, but simply as a liquidated debt due from the company to the insured (*Anderberg* v. *Metropolitan Life Insurance Co.*, 269 App. Div. 640; 58 N. Y. Supp. (2d) 120 [1945]).

In *New York Life Ins. Co.* v. *Federal National Bank*, 151 F. (2d) 537 [1945], cert. den. 327 U. S. 778, reh. den. 327 U. S. 816, the Court said, at page 539:

> "The relationship between a policy-holder and his company is in many respects analogous to that between a depositor and the bank. When a policy of insurance is issued, the company becomes indebted to the insured for the amount of the policy. In the contract the company agrees to pay the amount of the policy to the insured or to his order. A life insurance

contract differs from a contract resulting from a deposit in a bank in that the policy designates the persons to whom payment is directed. But it also gives the insured the right to give further or different orders for the payment of the amount due by giving the insured the right to change the beneficiary, and the further right to assign the policy."

See also:

Pape v. *Home Insurance Co.*, 139 F. (2d) 231, 234, [1943];

Van Saun v. *Metropolitan Life Insurance Co.*, 135 Misc. 855, 857; 239 N. Y. Supp. 698, 700 [1929].

We submit that there can be no doubt that the money due on a policy wherein the contingency provided for has occurred, represents a liquidated debt, to the extent of the face amount of the policy, due and owing from the insurance company to those entitled to the proceeds of the policy and that such money is "held or owing" within the meaning of Sec. 700 of the Abandoned Property Law; moneys due on such policies are debts analogous to the bank deposits involved in *Anderson National Bank* v. *Luckett*, 321 U. S. 233, *supra*, and the other cases cited in Point I, *supra*.

The fact that these companies do not have any specific sum set aside for each policy does not change the nature of the obligation; in this respect, banking organizations likewise intermingle the depositors' moneys, yet their debts have been held subject to being taken over by the State as abandoned property (see cases cited under Point I). So too, as to unclaimed corporate dividends, see: *In Re: Philadelphia Electric Company*, 352 Pa. 457, *supra*.

As to Claimed Defenses to Policies.

Appellants argue that the moneys due on some of the policies are not liquidated debts because they may have a good defense by virtue of fraud or misrepresentation or breach of conditions as to suicide, etc. The complaint does not set up any specific cases of policies as to which the companies claim such defenses; even if it did, it must be remembered that the question as to whether specific types of policies fall within the meaning or definition of a statute is of no relevancy in a declaratory judgment action seeking to declare the statute as a whole unconstitutional.

> "In passing upon the constitutionality of a statute," the judiciary is "concerned only with its practical general operation, not with the precise effect of descriptive words which may be applied to a given case." (*Peo. ex rel. Ryan* v. *Lynch*, 262 N. Y. 1, 3; 186 N. E. 28, 29 [1933].)
>
> cf. *Guardian Life Insurance Company of America* v. *Graves*, 268 App. Div. 809 [Case No. 4], 48 N. Y. Supp. (2d) 618 [1944]; aff'd, 294 N. Y. 953, 63 N. E. (2d) 185;
>
> *Caroline Products Co.* v. *United States*, 323 U. S. 18, 22 [1944].

Section 700 of the law defines abandoned property as money "held or owing" on a policy. If the companies have a good total or partial defense to any policy, the statute in no way precludes them from showing that no money is "held or owing" on such policy. We submit that there can be no gainsaying the statement by the Court of Appeals (R. 66) that:

> "* * * the statute (Sec. 700) leaves any of the plaintiff companies wholly free to set up any complete or partial defense whereby it may establish that

no moneys are 'held or owing' by it on a particular policy, or that only some fraction of the face amount of the contract is payable thereon. Maybe, as the companies say, they cannot effectually prepare possible defenses without a proof of claim, but inconvenience of that kind does not nullify the statute. • • •"

Aside from any questions of incontestability after two years (N. Y. Insurance Law, Sec. 155 [b]), it is to be remembered that the burden of establishing a breach of warranty or the falsity of a material representation rests upon the insurance company.

Piedmont & Arlington Life-Insurance Co. v. *Ewing*, 92 U. S. 377 [1875];
Northwestern Mutual Life Insurance Co. v. *West*, 68 F. (2d) 428 [1933], cert. den. 292 U. S. 627;
Keck v. *Metropolitan Life Insurance Company*, 238 App. Div. 538, 539; 264 N. Y. Supp. 892, 893 [1933]; aff'd, 264 N. Y. 422; 191 N. E. 495;
Van Valkenburg v. *American etc., Life Insurance Company*, 70 N. Y. 605 [1877].

The presumption is that the true age is stated in the policy.

Goell v. *United States Life Insurance Company*, 265 App. Div. 735, 736; 40 N. Y. Supp. (2d) 779, 780 [1943].

The law places not upon the insured but upon the insurer the onus of establishing any fraud or misrepresentation or a lapse of the policy.

Hirsch v. *New York Life Insurance Company*, 267 App. Div. 404, 408; 45 N. Y. Supp. (2d) 892, 895-6 [1944], and cases therein cited.

The burden of proving death by suicide is upon the insurance company. The presumption is against death by suicide. It is not the duty of the claimant under the policy to prove that the deceased did not commit suicide.

Home Benefit Association v. *Sargent*, 142 U. S. 691 [1892];

Modern Woodmen of America v. *Watkins*, 132 F. (2d) 352 [1942];

Williams v. *The United States Mutual Accident Association*, 82 Hun 268, 31 N. Y. Supp. 343 [1894], aff'd 147 N. Y. 693, 42 N. E. 726;

Harms v. *Metropolitan Life Insurance Company*, 67 App. Div. 139, 141; 73 N. Y. Supp. 513, 514 [1901].

As to Proof of Death and Surrender of Policy.

The fact that the company may not receive its "proof of death" does not militate against its opportunity to establish these defenses, for it is well settled that the requirement of proof of death means only proof of the event and the identity of the deceased; the company may not require additional details as to the ailments for which the deceased was treated or other details not directly concerned with the proof of death and the identity of deceased.

McCaffry v. *Metropolitan Life Insurance Company*, 172 Misc. 252, 257-259; 14 N. Y. Supp. (2d) 192, 196-7 [1939]; aff'd, 261 App. Div. 452; 25 N. Y. Supp. (2d) 926; aff'd, 287 N. Y. 704; 39 N. E. (2d) 306;

Buffalo, etc., Safe Deposit Company v. *Knights, etc., Association*, 126 N. Y. 450, 453-4; 27 N. E. 942 [1891].

The furnishing of proof of death is not a condition to the fixing of liability but rather a condition which must be fulfilled to enforce payment of the already accrued obligation in the sense that it is to be shown that the assured is dead. Upon the happening of the event upon which the policy is conditioned, "the reciprocal rights and liabilities of the parties have become fixed * * *." (*McNally et al.* v. *Phoenix Insurance Co.*, 137 N. Y. 389, 397-398; 33 N. E. 475, 477 [1893]). The requirement of due proof of death is simply "to give assurance that the event has happened, upon which the liability of the insurers depends." (*Wachtel* v. *Equitable Life Assurance Society*, 266 N. Y. 345, 351-352; 194 N. E. 850, 852 [1935]).

See also:

Commercial Casualty Insurance Co. v. *Stinson*, 111 F. (2d) 63 [1940], at p. 68, n. 11; cert. den. 311 U. S. 667;

Lampert v. *John Hancock Mutual Life Insurance Co.*, 28 Fed. Supp. 142 [1939], aff'd 107 F. (2d) 1016, cert. den. 309 U. S. 663.

We shall not attempt to paraphrase the language used by Special Term in rejecting appellants' arguments regarding proof of death and the surrender of policies (R. 52):

> "It is urged that until due proofs have been filed with the companies of the occurence of the contingencies which make the policies payable (such as death of the insured or expiration of the term of an endowment policy) the persons entitled to the benefits of the policies possess at most 'inchoate or potential choses in action'. Paragraph (a) of subdivision 1 of section 700 requires the turnover of unclaimed amounts of *matured* endowment policies and paragraph (c) makes like provision as to policies on the lives of residents *who have died*. Clearly, as to such

policies, the failure to file formal proofs with the companies is no different in principle than the failure to produce savings bank books, the production of which savings banks uniformly make a condition precedent of payment. Yet the United States Supreme Court has upheld the validity of statutes, similar to our Abandoned Property Law, which have been directed at savings banks (Provident Institution for Savings v. Malone, *supra;* Security Bank v. California, *supra*), notwithstanding the absence of any statutory requirement that the bank books be produced. The only other policies covered by the statute are those specified in paragraph (b), viz., where the insured, if living, would have reached the maximum age 'of the Mortality Table' (this varies from about 96 to 100, according to the Table used). It would seem that as to the amounts of such policies there is ample basis for holding that the choses in action are no longer merely potential or inchoate, and for permitting a state to take over custody, not for itself, but for the benefit of the claimants if they should ever appear."

POINT III

Both as a matter of law and in our "traditional notions of fair play and substantial justice" (*International Shoe Company* v. *Washington*, 326 U. S. 310, 316 [1945]), the situs of the debt or claim is in New York and subject to the asserted jurisdiction of its Legislature.

A.

The late Justice Cardozo, while sitting as a Judge of the New York Court of Appeals, in speaking of the situs to be attributed to intangibles, said, in *Severnoe Securi-*

ties Corp. v. *London and L. Insurance Co.*, 255 N. Y. 120, 123-4; 174 N. E. 299, 300 [1931];

"* * * The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. The locality selected is for some purposes, the domicile of the creditors; for others, the domicile or place of business of the debtor, the place, that is to say, where the obligation was created or was meant to be discharged; for others, any place where the debtor can be found (*Farmers L. & T. Co.* v. *Minnesota*, 280 U. S. 204, 211, 217; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Comm.*, 282 U. S. 1; *Liverpool & London & Globe Ins. Co.* v. *Board of Assessors*, 221 U. S. 346, 354; *Wyman* v. *Halstead*, 109 U. S. 654; *Douglass* v. *Phenix Ins. Co.*, 138 N. Y. 209, 219; *Harris* v. *Balk*, 198 U. S. 215). At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions (*Safe Deposit & T. Co.* v. *Virginia*, 280 U. S. 83, 92, 93; Powell, Business Situs of Credits, 28 W. Va. L. Quart. 89; cf. 34 Yale L. J. 652, 654, 656). * * *"

Viewed in this light, we submit there can be no question but that the situs of the debts or claims due under policies arising as a result of transactions between New York agencies of foreign corporations and residents of New York, insuring the lives of residents of New York and issued for delivery in New York, must be deemed to be in New York and subject to the asserted jurisdiction of its Legislature.*

* As the Court of Appeals pointed out in its opinion, New York is the place where, under the authorities, such contracts are to be considered made (R. 64-65). In fact, Insurance Law, Sec. 143 (2) prohibits foreign companies, as well as domestic, from providing in any policy "delivered or issued for delivery in this state" that the policy shall "be governed by the laws of any state or country other than this state."

These foreign insurance corporations may not do business in New York until they submit themselves to the jurisdiction of its courts; they must obtain from the Superintendent of Insurance a certificate authorizing them to do business in New York; they must deposit securities to the same extent as domestic companies; they must comply with regulations affecting domestic companies; they are subject to the same examination by the Superintendent as domestic companies; they must appoint the Superintendent as their attorney in New York for the service of all process in any action or proceeding (New York Insurance Law, Secs. 42; 59; 103; 143; 208 [5]; 216 [6]; *Morgan v. Mutual Benefit Life Insurance Co.*, 189 N. Y. 447; 82 N. E. 438 [1907]). They exercise the privilege of conducting business in New York with its residents. They enjoy the benefits and protection of the laws of New York. The obligation to which they are now subjected arises out of and is wholly connected with their activities in New York. The amounts due on these policies are an integral part of their local business and beyond question have acquired a local situs.

Citing, among others, the decisions of this Court in *Curry* v. *McCanless*, 307 U. S. 357 [1939]; *Hoopeston Co.* v. *Cullen*, 318 U. S. 313 [1943]; and *International Shoe Co.* v. *Washington*, 326 U. S. 310 [1945]. *supra*, the Court of Appeals has said in the case at bar (R. 65):

> "* * * For the core of the debtor obligations of the plaintiff companies was created through acts done in this State under the protection of its laws and the ties thereby established between the companies and the State were without more sufficient to validate the jurisdiction here asserted by the Legislature."

We respectfully submit that no other conclusion can be justified.

In addition to the cases cited by the Court of Appeals, see also:

Metropolitan Life Insurance Co. v. *New Orleans*, 205 U. S. 395 [1907];
Liverpool and London & Globe Insurance Co. v. *Board of Assessors*, 221 U. S. 346 [1911];
Orient Insurance Co. v. *Board of Assessors*, 221 U. S. 358 [1911].

Waiving aside all of these factors, appellants would have this Court attribute to these debts a situs in the state of the companies' incorporation simply because they were there chartered and there have their home offices. This Court has already answered such a contention in *Wheeling Steel Corp* v. *Fox*, 298 U. S. 193, 211 [1936]:

> "* * * To attribute to Delaware, merely as the chartering State, the credits arising in the course of the business established in another State, and to deny to the latter the power to tax such credits upon the ground that it violates due process to treat the credits as within its jurisdiction, is to make a legal fiction dominate realities in a fashion quite as extreme as that which would attribute to the chartering State all the tangible possessions of the Corporation without regard to their actual location."

See also:

Wirt Franklin Petroleum Corp. v. *Gruen*, 139 F. (2d) 659 [1944];
Young v. *South Tredegar Iron Co.*, 85 Tennessee 189, 196 *et seq.*; 2 S. W. 202, 204-6 [1886].

B.

Bearing in mind the public interest with which the business of life insurance is vested, New York, in common with other states, exacts strict compliance from insurance

companies with regulatory laws enacted to safeguard its citizens. These laws apply equally to any company doing business in the state, whether there chartered or elsewhere.

The domestic agencies of foreign corporations are in the eyes of the law, complete and separate organizations which are on a parity with and to be treated as domestic corporations. Even if, *arguendo*, we adopt the technical criterion urged by appellants, to wit, that the domicile of the debtor corporation is determinative of situs, we submit that in fixing the situs of the debt due on a policy written through the New York agency of a foreign company, on the life of a New York resident, and issued for delivery in New York, the New York agency must be regarded as if it were actually a complete and separate New York corporation with a resultant domicile in New York.

In *New England Mutual Life Insurance Co.* v. *Woodworth*, 111 U. S. 138 [1884], this Court, faced with a question analogous to the one here raised, held that where a life insurance company does business in a state other than that in which it is incorporated, "*the corporation must be regarded as having a domicil there, in the sense of the rule that the debt on the policy is assets at its domicil*" (p. 145). [Italics supplied.]

Citing the foregoing authority, among others, the late Justice Cardozo, in *Comey* v. *United Surety Company*, 217 N. Y. 268, 274; 111 N. E. 832, 834 [1916], said:

> "We think that a foreign corporation thus licensed under our own laws may not with reason be held to be absent from our state. It owes to the law of its creation its franchise to be a corporation, but it owes to the law of this state the privilege of doing business within our borders. In exercising that privilege it may be dealt with as if it were in truth a domestic corporation. This view of its position has support in recent decisions. In *Morgan* v. *Mutual Benefit Life*

Ins. Co.," (189 N. Y. 447, 454) we held that for many purposes a foreign insurance company, transacting business here, must be 'treated as a domestic insurance company and as domiciled in this state.' We pointed out that its presence here is 'not temporary, but continuous,' and under the authority of our laws. More recently, in *Lockwood* v. *U. S. Steel Corporation* (209 N. Y. 375, 385) we said that foreign insurance companies must be 'regarded as domiciled for certain purposes in the foreign state where they are permitted to do business.' (See also *New England Mut. Life Ins. Co.* v. *Woodworth*, 111 U. S. 138.) The principle of these decisions is applicable here. The defendant is not here occasionally and according to the shifting pleasure of its managers. It is here with a representative for the service of process under an appointment made permanent by the will of the law. In its transaction of business in New York, it is to be dealt with, *pro hac vice*, as a domestic corporation."

In *Morgan* v. *Mutual Benefit Life Insurance Co.*, 189 N. Y. 447, *supra*, the court held that the amount payable on a policy issued to a resident of New York by the domestic agency of a foreign insurance company has its situs as personal property in New York, and said (p. 454):

"* * * The contract of insurance was made by it with a resident of this state through its agents so located and doing business here. Every transaction relating to the contract, its assignment and the payment of premiums thereon has occurred here. The policy of insurance and the claim against the insurance company for the amount payable on the policy of insurance are in the control of our court and any judgment that may be rendered in the action can be enforced and made effectual in this state. As to such a claim the insurance company should be treated as a domestic insurance company and as domiciled in this state.

> The situs of the debt would consequently be here and the action is one to define and enforce an interest in specific personal property within the state within the meaning of the Code provision quoted. Whenever a question as to the situs of a similar claim against an insurance company doing business in a state pursuant to the statutes thereof has been directly involved in this court or in the Federal courts, and it has been sought to uphold the situs of the claim in the state where the contract was made, it has been sustained."

In this last mentioned case the court exhaustively reviewed all the authorities sustaining its position as to the situs in New York of the proceeds of the policy. In order that this brief be not unnecessarily lengthened, we respectfully refer this Court to the full discussion of the pertinent cases therein contained. We shall content ourselves with the observation made in *Martine* v. *The International Life Insurance Society of London*, 53 N. Y. 339, 347-8 [1873]:

> "It would be most unreasonable for these foreign corporations to ask the privilege of doing business under our laws in competition with domestic institutions, and then to ask exempton from the obligations and liabilities which attach to the latter. As to the business transacted here, the company must be regarded as domiciled by the residence of its general agents and its local organization."

The rule as to domestic branches of alien insurance companies is the same; in *Moscow Fire Insurance Company* v. *Bank of New York and Trust Company*, 280 N. Y. 286, 309-310; 20 N. E. (2d) 758, 766-7 [1939], (aff'd, *sub nom. U. S.* v. *Moscow Fire Insurance Co.* 309 U. S. 624), the late Judge Lehman said:

> "* * * The Insurance Law requires that before a foreign insurance corporation is permitted to do busi-

ness here there must be a definite separation and division of its property and even of its juristic personality. 'The Insurance Law as now written and as an entirety indicates a purpose and policy in dealing with foreign insurance companies doing business in this country which are so definite and plain that they fix upon the words under consideration an interpretation which cannot fairly be avoided. We think that the Legislature in allowing these foreign companies to do business in this State and country intended to treat the domestic agency largely as a *complete and separate organization,* to place it on a parity with domestic corporations, to supervise and regulate it as such and to require it by the deposit of prescribed assets *to set up within this country a capital corresponding to that of domestic corporations* and which should be security for business transacted by it here and not elsewhere.' (Matter of People [Norske Lloyd Ins. Co.] 242 N. Y. 148, 158.) (Italics are new.) Thus the property of the United States branch of a foreign insurance company acquires a character of its own. That character is 'dependent' upon the law of this State. The property from its nature is subject to the laws of this State, and both the property and 'the complete and separate organization' analogous to a domestic corporation are immune from the control of any foreign power. No rule of comity and no act of the United States government constrains this State to abandon any part of its control or to share it with a foreign State. * * *"

C.

In an effort to draw an analogy with the case of a New York resident who of choice deposits his money in a bank physically situated outside the State, appellants would have us believe that the New York resident who dealt with

a foreign insurance company deliberately chose to do his business and send his money out of the state (App. Br., p. 27). We think it a matter of common knowledge and experience that the person about to take out a policy of life insurance gives not a single thought to the fictional domicile of the insurance company. On the contrary, he knows that he is dealing with an agency of a company doing business in New York; a company which is licensed and regulated by New York for his protection.

D.

Nor can we agree that there is a "jurisdictional conflict" between the New York and Pennsylvania statutes (App. Br., p. 31). In Appendix B of their brief, appellants have set forth the definition of the word "company" as used in the Pennsylvania statute to be: "* * * insurance * * * corporations * * * incorporated * * * under the laws of this Commonwealth * * *" (App. Br., p. 47). Actually, between the words "incorporated" and "under" there appears another phrase which we believe changes the alleged meaning given to the definition by the appellants. The omitted phrase is "and doing business" so that the definition reads: "* * * insurance * * * corporations incorporated and doing business under the laws of this Commonwealth". (Purdon's Pennsylvania Statutes, Title 27, Sec. 435).

The effect of the limitation inserted by the words "and doing business under the laws of this Commonwealth" may be best seen by noting the language used in another portion of the Pennsylvania statute (*id.* Sec. 241) dealing with the escheat of unclaimed deposits wherein, in defining the persons subject to the statute, the act reads: "* * * every * * * insurance company * * * doing business within this Commonwealth."

We think it clear that the Pennsylvania legislature intended to exercise jurisdiction only over the business done

by its domestic companies within the Commonwealth (cf. *Mutual Life Insurance Co.* v. *Cohen*, 179 U. S. 262, *supra*).

That the best which can be said of the Pennsylvania statute is that it is ambiguous is evidenced by the allegations of the appellants in the very case at bar as contained in paragraph 27(n) of the Complaint (R. 20): "The States of Michigan, Pennsylvania and Kentucky have enacted similar statutes which, although vague and ambiguous, apparently provide for the payment to those States of the proceeds of insurance policies as abandoned property * * *."

Also in Appendix B of appellants' brief (p. 47), the statement is made that "Both States claim jurisdiction to escheat such policies." Despite the fact that one of the appellants is a Pennsylvania corporation (Penn Mutual Life Insurance Company—R. 5), yet nowhere in the Complaint (R. 4-33) is there contained a single allegation that the company has even been asked by the Commonwealth of Pennsylvania to pay over to it the proceeds of policies affected by the New York statute—that is, policies written through the New York agency of the company, on the lives of New York residents, and issued for delivery in New York.

The New Jersey statute (App. Br., p. 50) is similar to the New York statute in that it seeks to cover only the business done in New Jersey. The distinction between New Jersey and New York is that the former refers only to the business done in New Jersey by the domestic companies of that State. There is no basic conflict with New York. A policy written by a New York agency of a New Jersey corporation on the life of a resident of New York, and issued for delivery in New York, would not be covered by the New Jersey statute.

The same may be said of the Massachusetts statute (App. Br., p. 50). Not only does the statute limit the coverage to policies "issued on the lives of residents of this commonwealth" but the act provides in addition that if the

address given in the application for the policy is in the Commonwealth it is to be deemed a policy issued on the life of a resident of the Commonwealth within the meaning of the statute.

If the test of situs which we espouse and which the courts below have held to be controlling were to be applied by every other State, we would have a most desirable and just solution, for then each State would take into its custody proceeds on policies written by domestic companies and domestic branches of foreign companies on the lives of residents of that State and issued for delivery in that State.

E.

At page 30 of their brief, appellants contend that it is "Wasteful to report to 48 States, each with different statute and rules." Of course, no such situation now exists and if we take as a criterion the only statutes now existing, to wit, New York, Pennsylvania, New Jersey and Massachusetts, there is no basic conflict.

Fears of what other states may do are purely hypothetical and unreal possibilities which have no place whatsoever in the determination of the constitutionality of a statute. (*Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 353 [1937]; 16 *Corpus Juris Secundum, Constitutional Law*, Sec. 97.) The judiciary will not anticipate prospective conditions which are speculative and conjectural and may never arise (*Hodge Drive-It-Yourself Co.* v. *Cincinnati*, 284 U. S. 335, 338 [1932]).

An apprehension of exposure to "double liability" cannot be the basis of a declaration of unconstitutionality. "The duty of this Court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it" (*California* v. *San Pablo & Tulare R. R. Co.*, 149

U. S. 308, 314 [1893]). "This court does not sit here to try, moot cases to solve a question which may never be raised by any party entitled to raise it" (*Waite* v. *Dowley*, 94 U. S. 527, 534 [1876]).

See also:

Rescue Army v. *Municipal Court of Los Angeles*, 331 U. S. 549 [1947], at pp. 568, *et seq.*

So, too, we might here note that the appellants are in no position to question the effect of the statute on the rights of the assured, the beneficiaries or those claiming under them. One may attack the constitutionality of a statute only when and so far as it is being, or is about to be, applied to his own disadvantage; he cannot present constitutional objections on behalf of others. (*Tileston* v. *Ullman*, 318 U. S. 44 [1943]; *Doeller* v. *Neilston Warehouse Co.*, 311 U. S. 531 537 [1941]).

In *McCabe* v. *A. T. & S. F. Ry. Co.*, 235 U. S. 151, 161, 162 [1914], it was said that "the essence of the constitutional right is that it is a personal one". "The complainant cannot succeed", said Mr. Justice Hughes, "because some one else may be hurt. Nor does it make any difference that other persons, who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention."

Of course, the statute fully protects the rights of any person entitled to claim the proceeds of a policy. The act makes provision for the filing of claims with the State Comptroller and judicial review of any decision adverse to the claimant. The State takes over custody of the money as the representative of the parties entitled to payment and holds it for their protection (*Anderson National Bank* v. *Luckett*, 321 U. S. 233, *supra*, at page 241).

POINT IV

The Statute in no way violates appellants' constitutional rights.

As to Due Process and the Contract Clause Generally.

Whatever name we apply to the contractual relationship between the insurance companies and the policy holder or beneficiary, the fact remains that upon the maturity of an endowment policy or the death of the assured in a life policy, there is a liquidated debt due and owing from the company to those entitled to claim under the policy, a debt similar to bank deposits (*New York Life Ins. Co.* v. *Federal National Bank*, 151 F. (2d) 537, cert. den. 327 U. S. 778, *supra*). Two of the three types of policies set forth in Sec. 700 consist of contracts in which all conditions have actually been met; paragraph (a) of subdivision 1 applies to matured endowment policies, while paragraph (c) makes reference to policies where the assured has actually died. The third type, defined in paragraph (b), covers cases of presumed death where the insured, if living, would have reached the maximum age under the mortality table, varying from 96 to 100 years of age.

The case of *Anderson National Bank* v. *Luckett*, 321 U. S. 233, *supra*, and the other cases cited under Point I of this brief, fully dispose of all of the constitutional objections here raised by the appellants. Especially is this true of the *Anderson National Bank* case, for there, too, debts of a foreign corporation—a national bank—being situated in Kentucky, were held to be "a part of the mass of property within the state whose transfer and devolution is subject to state control" (p. 248), and to the state's "escheat" law In that case, this Court, in disposing of the due process and contract clause objections raised by the bank, said (p. 242):

> "Since the bank is a debtor to its depositors, it can interpose no due process or contract clause objection

to payment of the claimed deposits to the state, if the state is lawfully entitled to demand payment, for in that case payment of the debt to the state, under the statute, relieves the bank of its liability to the depositors."

Even though it has been held that payment to the State in and of itself discharges the obligation of the debtor (*Security Bank* v. *California*, 263 U. S. 282, 286, *supra; In re: Philadelphia Electric Company*,* 352 Pa. 457, *supra*), our Abandoned Property Law gives the debtor added protection by a specific provision that the insurance company, upon "making a payment of abandoned property to the comptroller shall immediately and thereafter be relieved and held harmless from any or all liability for any claim or claims which exist at such time with reference to such abandoned property or which may thereafter be made or may come into existence on account of or in respect of any such abandoned property" (Sec. 1404 [2]). Subdivision 3 of Sec. 1404 protects the insurance company from suit for "the recovery of abandoned property paid to the state comptroller * * * or for interest thereon subsequent to the date of the report" or for damages alleged to have resulted from such payment. Section 1405 provides that "no owner of abandoned property shall be entitled to re-

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* In the *Philadelphia Electric Company* case, involving unpaid dividends, etc., the court said: "* * * The power of the legislature to render property of the character here involved subject to escheat in favor of the Commonwealth is clear. * * * A legislative provision for escheat is a valid exercise of the police power of the State: see *Cunnius* v. *Reading School District, supra*, at p. 469 of 198 U. S. There is, therefore, no merit in the contention of the appellant companies that the Act of 1937, construed together with the Act of 1915, works a deprivation of property without due process of law. Nor do those statutes serve to impair the obligation of contracts. The constitutional guarantee in such connection is likewise subject to an appropriate exercise of the State's police power: *Zeuger Milk Company* v. *Pittsburgh School District*, 334 Pa. 277, 280, 5 A. 2d 885."

ceive interest on account of such abandoned property from and after the date" of the report, "whether or not he was entitled to interest on such property prior to such date" (cf. *Provident Institution, etc.* v. *Malone*, 221 U. S. 660, 665, *supra; Brooklyn Borough Gas Co.* v. *Bennett*, 154 Misc. 106, 115-116, *supra*).

In order that there should be no possibility of any question of lack of due process raised by a policy holder with regard to the foregoing provisions, the statute provides that before payment is made by the insurance company to the State, a statement as to such funds shall be published and among other things shall state that the unclaimed moneys will be paid to the State Comptroller and that the insurance company "shall thereupon cease to be liable therefor" (Sec. 702, subd. 3 [c. iii]).

Anderson National Bank v. *Luckett*, 321 U. S. 233, *supra;*
Security Bank v. *California*, 263 U. S. 282, *supra.*

When this action was first instituted, the insurance companies complained that even though they were relieved of liability under the law, yet they might be subject to suit by a policy holder in another state or that for reasons of good will they would want to pay a policy holder rather than to relegate him to a claim against the state. To obviate this objection, Chapter 452 of the Laws of 1946 added a new section 707 to Article VII of the Abandoned Property Law, reading as follows:

> "Sec. 707. Any life insurance corporation which has paid to the state comptroller moneys deemed abandoned property pursuant to the provisions of this article may make payment to any person entitled to all or any part thereof and shall thereby acquire all of the rights of such person to payment by the state comptroller."

Section 1407 provides that where the state comptroller makes payment of a claim, he shall deduct a service charge of one per cent, but in no event less than three dollars. The appellants would now seem to contend that if they should pay to a policy holder after the fund has been transferred to the state, they would, in recovering the money, lose the amount of this service charge. Aside from the question as to whether repayment of a fund to the insurance company itself (as distinguished from a claim established by and paid to one claiming under the policy) would come within the meaning or intent of Section 1407, the fact that this presents a purely hypothetical question as to what may happen (in no sense a proper basis for attack on the constitutionality of the statute as a whole), the insurance companies, if they do make payment after transfer to the State, may well be justified under the statute in making this same service charge against a creditor who has waited at least seven years to make his claim. In any event the question as to whether the State is entitled to make this service charge could arise only after the insurance company has seen fit to make payment subsequent to transfer to the State and would be the proper subject of litigation at the time of making a claim against the State under Section 707 rather than at this time when the constitutionality of the statute as a whole is under attack.

In so far as the expense of preparing the report and arranging advertising and the publication itself are concerned, we believe that Special Term has amply answered the argument of the appellants (R. 54):

> "Some mention is made in plaintiff's brief of the expense of preparing reports and arranging advertising for which, it is claimed, the companies receive no compensation. No real point is made of this, however. Section 1409 provides that any amount paid to newspapers for any publication of names required by the statute shall be charged equally against all abandoned

property held or owing at the time of the publication, except abandoned property of individual amounts of less than twenty-five dollars. The expense of preparing reports of abandoned claims, equally applicable to domestic and foreign corporations, is one which the state may impose without rendering the statute unconstitutional."

Cf. *Anderson National Bank* v. *Luckett*, 321 U. S. 233, *supra*, at pages 252-3.

As to the Statute of Limitations.

In the courts below, appellants contended that the statute should not be given a retroactive application and that if it be so construed "it illegally attempts to revive claims barred by the statute of limitations" (R. 65). Although appellants do not specifically mention these points in their Assignment of Errors or in their Argument, yet at pp. 7-8 of their brief, under a sub-heading to the effect that the decision below nullifies terms of contracts, they do make mention of the fact that the Court of Appeals "sees no obstacle to giving it 'a retrospective application'."

The Court of Appeals has given the statute a retrospective application. We assume that for the purpose of deciding the constitutional questions raised by appellants, this Court will "take the statute as though it read precisely as the highest court of the State has interpreted it". (*State of Minnesota ex rel Pearson* v. *Probate Court, etc.*, 309 U. S. 270, 273 [1940]).

Appellants' contention in the courts below was that since the statute applies only to policy debts which have existed for at least seven years and the statute of limitations applicable to contracts generally is six years, it follows that the debts sought to be taken into custody by

the State are barred and the moneys due on the policies are the property of the insurance companies, thereby making unconstitutional the provisions of Sec. 1400 of the law which provides that "The expiration of any period of time specified by law, during which an action or proceeding may be commenced or enforced to secure payment of a claim for money or recovery of property, shall not prevent any such money or property from being deemed abandoned property, * * *."

A.

Even if we assume, *arguendo*, that all policy debts are barred by the statute of limitations if no claim is made within six years of maturity in the case of an endowment policy or the death of the assured in the ordinary life policy, yet it is plain that the running of the statute merely wipes out the creditor's remedy and not the debt, and that no property right is created in the debtor insurance companies. The running of the statute simply leaves the companies in the position of holding unclaimed funds as to which there is a failure of ownership.

State v. *Marshall & Illsey Bank of Milwaukee*, 234 Wis. 375, 291 N. W. 361 [1940], involved a statute directing that unclaimed bank deposits be turned over to the custody of the State after a lapse of a specified number of years. The bank contended that since the statute of limitations had run against the depositor's right to collect the money, the State's attempt to take the fund was actually a taking of the bank's own property and therefore unconstitutional. The Supreme Court of Wisconsin, in overruling this contention, said (p. 379):

> "The bank urges in defense that the state statute of limitations had destroyed the claimant's right of action to recover the funds, and that therefore the funds were not 'on deposit or otherwise' when the statute went into effect. If our statute of limitations

> has destroyed the claimant's rights it is no affair of the bank under the instant statute. The bank's rights as against the state are not affected by it. 'The contract of deposit does not give the banks a tontine right to retain the money in the event that it is not called for by the depositor.' *Securities Savings Bank* v. *California, supra,* p. 286 [of 263 U. S.]. The bank is not affected by the statute of limitations when it has no right to retain the money."

"The Statute of Limitations does not pay the debt. It merely deprives claimant of its remedy." (*Matter of Elm Street,* 239 N. Y. 220, 229; 146 N. E. 342, 345 [1924]). "The fact that the statute of limitations may have run against the owners of the property in controversy as between them and the accountable corporate custodian does not operate to defeat the Commonwealth's escheatage * * *." (*In re*: *Philadelphia Electric Company,* 352 Pa. 457, 463, *supra*).

See also:

Commonwealth ex rel. Margiotti v. *Cunningham,* 337 Pa. 289, 297-8; 10 A. 2d 559, 563 [1940];

In re: *Pennsylvania Indemnity Corp'n.,* 37 Pa. District and County Reports 208 [1939];

In re: *The Harrisburg Gas Company,* 38 Pa. District and County Reports 611 [1940];

30 *Corpus Juris Secundum, Escheat* Sec. 3, subd. (b).

Even if the statute be so construed that abandoned claims be revived thereby, "this will be no offense against constitutional law". (R. 66; *Campbell* v. *Holt,* 115 U. S. 620 [1885], *Chase Securities Corp.* v. *Donaldson,* 325 U. S. 304 [1945]; *Matter of New York University* (*Moore*), 296 N. Y. 913 [1947]).

B.

In view of the foregoing, we need not concern ourselves with the question as to whether the six year statute of limitations (N. Y. Civil Practice Act, Sec. 48 (1)) applies to matured life insurance policies where there has been a failure of ownership. In any event, it must be remembered that the statute of limitations would not begin to run until the beneficiary was in a position to present proof of death— a most improbable occurence in these cases where there is a total failure of ownership. (*Gardner* v. *Northwestern Mutual Life Insurance Company,* 246 App. Div. 868 (1), 285 N. Y. Supp. 74 [1936]; aff'd 272 N. Y. 592, 4 N. E. (2d) 818).

Conclusion

In Appendix B of their brief (pp. 48-50), appellants point out that the first enactment dealing with abandoned funds held by insurance companies was chapter 923 of the Laws of New York of 1939; that this act applied only to domestic companies; that in an action by the New York Life Insurance Company to have the act declared unconstitutional, an injunction *pendente lite* was granted; that the statute was then amended so as to limit it to policies issued by New York companies upon the lives of residents of New York and that as a result, the action was discontinued.

The orignial 1939 statute was very much different from the one under consideration in this case. It not only covered matured policies, but also certain reserves on policies under non-forfeiture provisions and on annuity policies; it applied to all domestic companies regardless of the state in which the business was transacted. Special Term (*New York Life* v. *Pink et al.,* New York Law Journal, Dec. 21, 1939, p. 2257, N. Y. Supreme Court, N. Y.

County, Special Term, Part III, *McCook, J.;* not officially reported) expressly disclaimed "any intention of passing even on the question of reasonableness, and has no opinion to express on that of constitutionality," but granted an injunction *pendente lite* solely on the ground that important constitutional questions were involved and the insurance companies should not be put to the expense of publishing reports until such questions could be litigated.

When the statute was amended so as to limit its applicability to policies written on the lives of residents of New York—that is, making the act applicable only to the business transacted in New York—the insurance companies withdrew their action.

Aside from the question of situs, every objection to the statute raised by the appellant foreign insurance companies is equally available to domestic companies. Yet, as pointed out by Special Term in the case at bar, "Since the 1940 amendment, which restricted the scope of the 1939 statute to policies issued by domestic companies on the lives or residents of this state, no domestic company has questioned the validity of the statute" (R. 51).

An affirmance by this Court of the judgment below will simply mean that the business done by domestic agencies of foreign insurance corporations in New York is to be treated in exactly the same manner and subject to the same requirements (in so far as the Abandoned Property Law is concerned) as the business transacted by domestic insurance companies in New York. The New York Legislature, by this law, properly seeks to reach only the business done in New York, and not elsewhere. (*Mutual Life Insurance Co.* v. *Cohen,* 179 U. S. 262, *supra*; *U. S. Mortgage & Trust Co.* v. *Ruggles,* 258 N. Y. 32; 179 N. E. 250 [1932]). A reversal would lead to the wholly unjustifiable result that the proceeds of unclaimed or abandoned policies which "were written and/or delivered in New York by New York agencies of the [foreign] companies and insured the lives of New York residents" (R. 51)

would be paid over to other states simply because the companies were originally there incorporated, rather than to New York. "* * * in States bound together by a Constitution and subject to the Fourteenth Amendment, more caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." (Mr. Justice Holmes in *McDonald* v. *Mabee*, 243 U. S. 90, 91 [1917]).

We respectfully submit that the judgment of the Court below should in all respects be affirmed.

Dated, New York, N. Y., December 1, 1947.

Respectfully submitted,

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FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 337

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, NATIONAL LIFE INSURANCE COMPANY, PENN MUTUAL LIFE INSURANCE COMPANY, and PHOENIX MUTUAL LIFE INSURANCE COMPANY (original Plaintiffs); and AETNA LIFE INSURANCE COMPANY, THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA, THE UNION MUTUAL LIFE INSURANCE COMPANY (Plaintiffs Added by Stipulation),

Appellants,

v.

FRANK C. MOORE, Comptroller of the State of New York,

Appellee.

APPEAL FROM THE NEW YORK COURT OF APPEALS

Involving the Abandoned Property Law

PETITION FOR REHEARING

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Appellee.

APPEAL FROM THE NEW YORK COURT OF APPEALS

Involving the Abandoned Property Law

PETITION FOR REHEARING

Appellants respectfully request a rehearing on the question of what State has jurisdiction to escheat the proceeds of abandoned life insurance policies. We respectfully suggest that the Attorneys General of the States in which appellants are incorporated be invited or permitted to participate in a rehearing and reargument.

The Court's decision was delivered March 29, 1948. Three Justices dissented, and one Justice did not hear the oral argument but joined in the majority opinion.

We earnestly urge the following grounds:

(1) Confusion to the entire life insurance industry, to the States, and to the Courts below, will be created unnecessarily by the present decision.

(2) The nature of these new wholesale escheat statutes calls for a practical and definite rule of jurisdiction. To insist that it be fought out piecemeal would be a step backward by a Court which has taken such great strides forward in modernizing our federal procedure.

(3) No real obstacle exists to formulating a workable rule here, and it is urgently needed.

(4) The facts are not hypothetical on any material factor. It would add nothing to know the name of the policyholder, or the date when he moved from New York, or the name of the State where he died. The decisive factors would be the same.

(5) States' rights can be protected by inviting or permitting their Attorneys General to participate.

(6) Pennsylvania's statute (which was the first act on this subject) is invalidated to a large extent by the decision, it seems, and yet even this is not too clear. Similar problems may be involved in the application of the decision to the Connecticut statute. The Pennsylvania rule is the only practical rule, and is legally sound under the bank account decisions of this Court.

(7) With more than 40 State legislatures meeting in regular session shortly after January 1, 1949, each seeking new sources of revenue, a more adequate guidepost is needed from this Court on the question of jurisdiction. The bulk of these abandoned policies which have accumulated over the years will escheat in the first year of such legislation. Hence the urgency of a workable rule of jurisdiction before it is too late to unscramble the rights of all concerned.

(8) The unusual, if not unique, decision of this Court, refusing to pass upon vital parts of the statute which were clearly raised and passed upon in the State Court, and yet affirming the State Court's judgment, instead of reversing or modifying it in part, leaves the appellants exposed to double escheat (a very different thing from double taxation). In effect it deprives the appellants of their right to a decision by this Court on constitutional questions forced upon appellants by the language of the statute itself and determined by State Courts.

(9) The statute as construed by the New York Comptroller and by the New York Court of Appeals specifically applies even though there was a change of residence after a policy was issued and regardless of where the beneficiary resided at the maturity of the policy (R. 11-12, fol. 19; R. 14, fol. 23; R. 16-17, fol. 26; R. 19-20). It is conceded that New York will enforce the statute in that manner, unless prevented by this Court (R. 20, par. "28"). It is also conceded that every year thousands of policyholders change their residences from one State to another (R. 9-10, fol. 16). The statute itself specifically mentions and covers instances where the last known address of the policyholder is outside of New York State (Sec. 702(2), R. 25, fol. 38). Nevertheless this Court's present decision reserves the question of whether the act is constitutional in such instances, and thereby fails to pass upon this important part of the statute itself, although the Courts below have held this part constitutional.

(10) The Court apparently sustains New York's right to take the money if the policy was issued for delivery in New York upon the life of a then resident of New York, and if there was no later change of residence, and yet the Court says: "The problem of what another state than New York may do is not before us.

That question is not passed upon." (Mr. Justice Reed's opinion, p. 7, line 5). This statement may be seized upon by other States to escheat the same money on a different theory of jurisdiction.

We have here a new theory, the wholesale escheat of so-called abandoned policies. It affects an entire industry, and the jurisdictional rights of every State. Every year the proceeds of many policies must be turned over to some State. To keep this new type of legislation on the correct jurisdictional path is important. It deserves and needs the guidance of this Court.

The essential facts are very simple. They are not hypothetical on any material point. They are necessarily limited to the companies' records which show the address of the insured at the time that a policy was applied for; sometimes a later change of address; and sometimes the address of the beneficiary. No one knows whether these addresses were the residences (i.e., domiciles, if that is what the Court meant) of the policyholders (R. 9-10, 17, 44, 50). No one knows the residence of either at the time of maturity of the policies. If that were known there would be few, if any, abandoned policies. There is no practical way of determining the residence of these missing policyholders, either at the time that the policies were issued, or at any later date (R. 9-10, 44, 50).

The problem is a practical one and the rule of jurisdiction should be a practical one appropriate to the known facts. Having sustained mass escheats the Court should formulate a workable rule of jurisdiction. This can only be accomplished by eliminating the residence factor which can hardly ever be determined as a practical matter.

The rule applied to the escheat of bank accounts and has become part of our law. It works satisfactorily because it is based on a known factor, the location of the bank. It ignores the residence of the depositor, an unknown factor.

It is the only rule which can work where escheat is attempted on a wholesale basis.

Unless the Court's decision is modified the insurance companies are in a serious dilemma, through no fault of their own. The New York Court of Appeals has ruled that these policies must be paid to New York if the policy was issued for delivery in New York upon the life of a resident of New York. This Court affirms, except that it leaves open the validity of the law "in instances where the insured persons, after delivery, cease to be residents of New York or where the beneficiary is not a resident of New York at maturity of the policy" (Mr. Justice Reed's opinion at p. 8). The result is that the companies are compelled under the New York decision to pay to the State, and yet under the decision of this Court the companies may find that they are again liable if it develops that the insured changed his residence, or if the beneficiary resided elsewhere at the maturity of the policy,—matters which are impossible to determine.

The reason given for this ruling is that the "interests of other possible parties not represented here may be effected by our conclusions and no specific instances of those types appear in the record" (Mr. Justice Reed's opinion at p. 8). To this we respectfully point out that the interests of the missing policyholders or beneficiaries in these abandoned property cases can never be represented, and yet there was no difficulty in formulating a rule of jurisdiction in the bank account cases where none of the depositors or beneficiaries were represented. Nor would it be any easier to decide the case if the record showed that "John Doe" moved from New York after the policy was issued, or that the beneficiary resided elsewhere at the maturity of the policy. The record already shows that many such instances will come under this statute. How could it really enlighten the Court to have the name or date? As pointed out in the bank account cases there is

no prejudice to the insured or beneficiaries because the money is as safe in the hands of one State as another. The only other parties in interest are the various States. Their Attorney Generals could be invited to participate in a rehearing if the Court approves.

In the bank account cases the Court arrived at a practical rule of jurisdiction which seems to have worked satisfactorily throughout the nation. Undoubtedly all States would prefer a workable rule to a dilemma. An unworkable rule will involve the companies and the States in a multiplicity of needless litigation, costing the States and the life insurance companies large sums.

It is impossible to base a workable rule upon the residence factor. We respectfully suggest the very simple and practical rule which this Court has long applied to abandoned bank accounts, which is that the State in which the bank is located has power to escheat. The facts here are identical. Each is a debt. In each the creditor is missing. In each the account is deemed abandoned. In each the residence is unknown, and quite immaterial according to the decisions in *Anderson National Bank* v. *Luckett*, 321 U. S. 233, and *Security Bank* v. *California*, 263 U. S. 282.

In this case, as in the bank account cases, the only known factor is the location of the debtor (the bank or the insurance company). That is enough. Why complicate it with questions of residence which are impossible to determine? There was no hypothetical problem there, and there is none here. On the other hand, the residence approach will obviously lead the companies and the States into a maze of litigation and legislation because it is impossible in this type of wholesale escheat to determine residence of these missing persons.

The bank account cases have woven a jurisdictional pattern into the fabric of the law, and a good one. There is no real obstacle to continuing that pattern in the life insurance cases. It hurts no one and helps many. It leaves the money in the State where the policyholder himself sent it. It avoids the extravagant waste of time in preparing reports for 48 States instead of one report for one State. It respects the statutes of Pennsylvania and other States which have limited their legislation to policies issued by domestic companies, apparently following the bank account decisions, which they were quite justified in supposing were equally applicable to insurance accounts. In short, it deals with realities in a practical way that no State could seriously object to. Even the State of New York conceded upon the argument, if our recollection is correct, that it would lose nothing by such a rule, and we are reasonably sure that most States would much prefer such a workable rule.

Counsel for the appellants hereby certify that this petition is presented in good faith and not for delay.

Respectfully,

GANSON J. BALDWIN
BUIST MURFEE ANDERSON
JOHN F. HANDY
Counsel for Appellants

April 8, 1948.

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Supreme Court of the United States

October Term, 1947

No. 337

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, NATIONAL LIFE INSURANCE CO., *et al.*,

Appellants,

against

FRANK C. MOORE, Comptroller of the State of New York,

Appellee.

BRIEF FOR APPELLEE IN OPPOSITION TO PETITION FOR REHEARING

NATHANIEL L. GOLDSTEIN,
Attorney General of the State
of New York,
Attorney for Appellee.

WENDELL P. BROWN,
Solicitor General,

ABE WAGMAN,
Assistant Attorney General,

of Counsel.

BATAVIA TIMES, LAW PRINTERS
BATAVIA, N. Y.

Supreme Court of the United States

October Term, 1947

No. 337

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, NATIONAL LIFE INSURANCE CO., *et al.*,

Appellants,

against

FRANK C. MOORE, Comptroller of the State of New York,

Appellee.

BRIEF FOR APPELLEE IN OPPOSITION TO PETITION FOR REHEARING

It is respectfully submitted that this Court should deny in all respects the appellants' petition for a rehearing on the question of what State has jurisdiction to escheat the proceeds of abandoned life insurance policies.

The case presented to and decided by this Court involved solely the constitutional power of New York to take into its custody the proceeds of abandoned life insurance policies issued under specific conditions. The matter raised by the petition for rehearing is dehors the issue and presents hypothetical possibilities and anticipatory conditions which are moot and may never be raised. "The duty of

this Court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it". (*California* v. *San Pablo & Tulare R. R. Co.*, 149 U. S. 308, 314 [1893]).

In any event, all of the issues raised in the petition for rehearing were presented to this Court in the original briefs and were undoubtedly considered before rendition of the decision.

Dated, New York, N. Y., April 14, 1948.

Respectfully submitted,

NATHANIEL L. GOLDSTEIN,
Attorney General of the State
of New York,
Attorney for Appellee.

WENDELL P. BROWN,
Solicitor General,

ABE WAGMAN,
Assistant Attorney General,
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 337

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, NATIONAL LIFE INSURANCE COMPANY, PENN MUTUAL LIFE INSURANCE COMPANY, and PHOENIX MUTUAL LIFE INSURANCE COMPANY (original Plaintiffs); and AETNA LIFE INSURANCE COMPANY, THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA, THE UNION MUTUAL LIFE INSURANCE COMPANY (Plaintiffs Added by Stipulation),

Appellants,

v.

FRANK C. MOORE, Comptroller of the State of New York,

Appellee.

APPEAL FROM THE NEW YORK COURT OF APPEALS

PETITION OF THE STATE OF CONNECTICUT FOR LEAVE TO INTERVENE AND PARTICIPATE IN ANY FURTHER PROCEEDINGS

WILLIAM L. HADDEN,
Attorney General.

JACK RUBIN,
Assistant Attorney General.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 337

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, NATIONAL LIFE INSURANCE COMPANY, PENN MUTUAL LIFE INSURANCE COMPANY, and PHOENIX MUTUAL LIFE INSURANCE COMPANY (original Plaintiffs); and AETNA LIFE INSURANCE COMPANY, THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA, THE UNION MUTUAL LIFE INSURANCE COMPANY (Plaintiffs Added by Stipulation),

Appellants,

v.

FRANK C. MOORE, Comptroller of the State of New York,

Appellee.

APPEAL FROM THE NEW YORK COURT OF APPEALS

PETITION OF THE STATE OF CONNECTICUT FOR LEAVE TO INTERVENE AND PARTICIPATE IN ANY FURTHER PROCEEDINGS

It has come to the attention of the Attorney General of the State of Connecticut that the Appellants in the above-entitled case have filed a petition for rehearing. The State of Connecticut, through its Attorney General, therefore, respectfully requests leave to intervene in this case and to participate in any further proceedings in this Court.

The order of the Supreme Court of the United States, embodied in the majority opinion, was that "The judgment of the Court of Appeals of New York is affirmed except as to issues specifically reserved." Admittedly one of the issues specifically reserved was the "problem of what another state than New York may do". However, the practical effect of this order is to force Appellants to pay over to New York certain funds.

Three of appellant companies are chartered by Connecticut and as to these Appellants the funds are held in and protected by Connecticut. Under the principles of escheat heretofore recognized by this Court, Connecticut and not New York has the right to escheat funds held in and protected by Connecticut.

Connecticut has passed legislation designed to escheat certain unclaimed funds, including funds held by life insurance companies. Attached hereto as Appendix A is a copy of the Connecticut statute, effective October 1, 1947, which was passed by the 1947 General Assembly. It is our contention that the State of Connecticut under this statute has proper and superior claim to the very same funds which under this decision New York will receive. These unclaimed funds in Connecticut are held in and protected by Connecticut and have been accumulated over the years; and, once escheated by New York, these funds will not be available to Connecticut because the same property cannot be escheated twice; or if the State of Connecticut insists upon its claimed rights under its statutes and is upheld in its State Courts, it will subject the insurance companies, innocent stakeholders, to double liability. Should the State of Connecticut refuse to sub-

ject the insurance companies to double liability, the State of Connecticut would in effect have lost a contended right without an opportunity to be heard.

Connecticut respectfuly requests that this, its petition to intervene and participate, be granted and that in further proceedings in this case this Court determine whether Connecticut or New York has the superior claim to escheat as to these funds held in and protected by Connecticut.

Respectfully submitted,

WILLIAM L. HADDEN,
Attorney General.

JACK RUBIN,
Assistant Attorney General.

APPENDIX A

Sections 34i-41i Inclusive, of the 1947 Supplement to the General Statutes of Connecticut, Effective October 1, 1947 (Public Act No. 508, 1947)

Sec. 34i. Definitions. As used in sections 35i to 41i, inclusive, the word "person" shall include each individual, partnership, unincorporated association, limited partnership, partnership association, company, corporation and any other natural or artificial entity of any kind; the word "property" shall include only all moneys, choses in actions, debts, dues and demands, as well as interest and accretions thereon accrued between the time of the institution of the proceedings under said sections and the actual distribution thereof.

Sec. 35i. Escheat of property unclaimed or unused for seven years. Any property, the owner of which has not exercised any right of ownership or possession thereof or claim thereto for a period of seven successive years and the whereabouts of such person being unknown to the person having custody or possession thereof, shall escheat to the state. The person having possession or custody of such escheated property shall, within a period of six months after such escheat, file with the secretary of the state a statement under oath containing the name of the last-known owner of such property, his last-known address, a description thereof and an estimate as to its value and any other information which may assist said secretary in determining the whereabouts of such owner. Wilful failure to file such report shall be a misdemeanor and subject to a fine of not more than five hundred dollars or to imprisonment of not more than sixty days or both.

Sec. 36i. Sale of escheated property. When any property other than moneys shall escheat to the state in accordance with the provisions of section 35i, the state treasurer shall cause such escheated property to be sold at public sale for the best price obtainable and the proceeds thereof shall be held subject to the provisions of sections 34i to 41i, inclusive, in lieu of such escheated property.

Sec. 37i. Petition in case of interest in escheated property. Any party in interest who has not had actual knowledge or notice of such proceedings, or who is aggrieved thereby, may, prior to the date of the final settlement thereof or within but not after seven years from said date, file his petition with the superior court in the county in which he resides, setting forth his interest in the escheated property and praying for the payment or delivery to him of the property or the proceeds thereof. A copy of such petition shall be served upon the attorney general within ten days after its filing, and thereupon the court shall, upon reasonable notice to the attorney general and the petitioner, hear such petition and the proofs offered in support of and against the petition, and, if the claim of the petitioner is allowed, the state treasurer shall issue to the petitioner a warrant upon the treasury for the amount which has been paid into the state treasury, after deducting all costs and expenses arising from the escheat proceedings and from the proceedings instituted by such petitioner.

Sec. 38i. Appeal. Any person aggrieved by any order allowing or dismissing such petition may appeal to the supreme court of errors.

Sec. 39i. Examination of witnesses. The state treasurer shall have power to summon any person alleged to have knowledge touching any of the facts relating to such escheat to appear before him, and he may examine such persons upon their oaths or affirmations as to any fact touching

such escheat, and shall permit all parties claiming to have any interest in such proceedings to appear therein, and to produce and examine such witnesses.

Sec. 40i. Action against custodian of property. The state treasurer shall have the right to institute an action with respect to the subject matter of sections 34i to 41i, inclusive, against any person having possession or custody of any property alleged to be the subject of escheat.

Sec. 41i. Application of provisions. Sections 34i to 41i, inclusive, shall not apply to property the escheat of which is otherwise provided for by any statute enacted prior to October 1, 1947, and shall not apply to the proceeds of life insurance policies awaiting the happening of a contingency upon the happening of which such proceeds shall become payable, or surrender values of policies, or portions of premiums held to the credit of policyholders by life insurance companies having no capital stock, or property as to which any person has had the continued uninterrupted adverse use or enjoyment under claim of right for a period of fifteen years prior to October 1, 1947.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1947

No. 337

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, NATIONAL LIFE INSURANCE COMPANY, PENN MUTUAL LIFE INSURANCE COMPANY, and PHOENIX MUTUAL LIFE INSURANCE COMPANY (original Plaintiffs); and AETNA LIFE INSURANCE COMPANY, THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA, THE UNION MUTUAL LIFE INSURANCE COMPANY (Plaintiffs Added by Stipulation),

Appellants,

v.

FRANK C. MOORE, Comptroller of the State of New York,

Appellee.

APPEAL FROM NEW YORK COURT OF APPEALS

PETITION OF THE STATE OF VERMONT FOR PERMISSION TO INTERVENE

CLIFTON J. PARKER,
Attorney General of the State of Vermont.

April 21, 1948

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1947

No. 337

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, NATIONAL LIFE INSURANCE COMPANY, PENN MUTUAL LIFE INSURANCE COMPANY, and PHOENIX MUTUAL LIFE INSURANCE COMPANY (original Plaintiffs); and AETNA LIFE INSURANCE COMPANY, THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA, THE UNION MUTUAL LIFE INSURANCE COMPANY (Plaintiffs Added by Stipulation),

Appellants,

v.

FRANK C. MOORE, Comptroller of the State of New York,

Appellee.

APPEAL FROM NEW YORK COURT OF APPEALS

PETITION OF THE STATE OF VERMONT FOR PERMISSION TO INTERVENE

Having been informed that the appellants have filed a petition for rehearing, the State of Vermont by its Attorney General, respectfully requests permission to intervene and participate in the case.

One of the appellants, the National Life Insurance Company, is a Vermont corporation. We believe that the State

of Vermont alone has jurisdiction to escheat or take custody of any unclaimed or abandoned funds payable under policies issued by a Vermont corporation. Such sums are payable in Vermont and are held in and protected by the State of Vermont, in our opinion.

Under the New York statute involved in this case, New York claims jurisdiction over such funds, and the decision of this Court, as we understand it, recognizes New York's jurisdiction, at least to some extent, although apparently reserving the "problem of what another state than New York may do", and certain other issues. However, it seems that the practical effect of the decision is to turn the funds, or a large portion of them, over to the State of New York, which in effect deprives Vermont of jurisdiction, unless the insurance company is to be subjected to a double escheat of the same funds. Obviously no state would wish to subject an insurance company to double liability.

At present Vermont has no statute covering the escheat or custody of the proceeds of abandoned or unclaimed life insurance funds, but nevertheless its jurisdiction to enact such legislation and to have it apply to all policies issued by a Vermont corporation, where the funds are payable in Vermont under the terms of the contracts, and where the funds are held in and protected by the State of Vermont, should be upheld.

Respectfully submitted,

CLIFTON J. PARKER,
Attorney General of the
State of Vermont.

April 21, 1948

SUPREME COURT OF THE UNITED STATES

No. 337.—October Term, 1947.

The Connecticut Mutual Life Insurance Company, Massachusetts Mutual Life Insurance Company, National Life Insurance Company et al., Appellants, v. Frank C. Moore, Comptroller of the State of New York.	Appeal from the Court of Appeals of the State of New York.

[March 29, 1948.]

Mr. Justice Reed delivered the opinion of the Court.

We are asked in this suit to consider the validity of the New York Abandoned Property Law as applied to policies of insurance issued for delivery in New York on the lives of residents of New York by companies incorporated in states other than New York.

Article VII of the Abandoned Property Law, headed "Unclaimed Life Insurance Funds," was enacted in 1943. In 1944 the law was amended so as to cover insurance companies incorporated out of state.[1] Section 700 states that "any moneys held or owing" by life insurance companies in the following three classes of policies issued

[1] The first statute which included insurance policies as abandoned property was enacted in 1939, ch. 923 of the Laws of 1939. That statute applied only to companies incorporated in New York, but covered all policies issued by such companies. Chapter 602 of the Laws of 1940 amended the statute so as to apply only to policies issued on the lives of residents of New York. Chapter 697 of the Laws of 1943 reenacted the principal features of the earlier statutes as Art. VII, and cc. 497 and 498 (§ 2) of the Laws of 1944 made the statute applicable to foreign insurance companies. Chapter 452 of the Laws of 1946 amended Art. VII so as to provide that a life insurance company which had paid the proceeds of a policy to the state could subsequently pay a second time to a claimant and acquire the rights of the claimant against the comptroller.

on the lives of residents of New York shall be deemed abandoned property: (1) matured endowment policies which have been unclaimed for seven years; (2) policies payable on death where the insured, if living, would have attained the limiting age under the mortality table on which the reserves are based (an age varying from 96 to 100), as to which no transaction has occurred for seven years; and (3) policies payable on death in which the insured has died and no claim by the person entitled thereto has been made for seven years.[2] Other sections

[2] "§ 700. Unclaimed life insurance corporation moneys.

"1. The following unclaimed property held or owing by life insurance corporations shall be deemed abandoned property:

"(a) Any moneys held or owing by any life insurance corporation which shall have remained unclaimed for seven years by the person or persons appearing to be entitled thereto under matured life insurance policies on the endowment plan issued on the lives of residents of this state.

"(b) Any moneys held or owing by any life insurance corporation which are payable under other kinds of life insurance policies issued on the lives of residents of this state where the insured, if living, would, prior to the thirty-first day of December next preceding the report required by section seven hundred one, have attained the limiting age under the mortality table on which the reserves are based, exclusive of

"(i) any policy which has within seven years been assigned, readjusted, kept in force by payment of premium, reinstated or subjected to loan, or

"(ii) any policy with respect to which such corporation has on file written evidence received within seven years that the person or persons apparently entitled to claim thereunder have knowledge thereof.

"(c) Any moneys held or owing by any life insurance corporation due to beneficiaries under policies issued on the lives of residents of this state who have died, which moneys shall have remained unclaimed by the person or persons entitled thereto for seven years.

"2. Any such abandoned property held or owing by a life insurance corporation to which the right to receive the same is established to the satisfaction of such corporation shall cease to be deemed abandoned."

of Art. VII provide that insurance corporations doing business in New York shall make an annual report of abandoned property falling within the definitions of § 700, the lists shall be advertised, and if the abandoned property advertised remains unclaimed, the amounts due and owing shall be paid to the state comptroller so as to be in the care and custody of the state. Art. VII, § 703, Art. XIV, § 1402; State Finance Law § 95. Upon payment to the state, the companies are discharged of any obligation, and any person subsequently setting up a claim must file a claim with the comptroller. A penalty of $100 a day is provided for failure to file the required report. Art. XIV, § 1412.

The present suit was brought by nine insurance companies, incorporated in states other than New York, in the Supreme Court of New York for a declaration of the invalidity of the Abandoned Property Law of New York, as applied to the plaintiffs, and to enjoin the state comptroller and all other persons acting under state authority from taking any steps under the statute. The Supreme Court ruled that the Abandoned Property Law was void in so far as it applied to policies of life insurance issued for delivery outside of New York by foreign life insurance companies. As no appeal from this ruling was taken by the state, it is not before us. The Supreme Court reserved to the appellant insurance companies the right to assert the invalidity of the Abandoned Property Law or any application thereof in so far as such law or state action thereunder sought to deprive them of any defense against any claim under any life insurance policy. With the above exceptions, the Supreme Court upheld the life insurance sections of the Abandoned Property Law against appellants' attack. The Appellate Division affirmed and the Court of Appeals reversed the judgment of the Supreme Court in so far as it reserved to the companies further right to assert defense against claims under

the policies. The Court of Appeals by its interpretation of the New York statute left open to the insurance companies all defenses except the statute of limitations, noncompliance with policy provisions calling for proof of death or of other designated contingency and failure to surrender a policy on making a claim. — N. Y. —. With this modification, it affirmed the trial court's judgment.[3] Appeal to this Court was perfected under § 237 (a) of the Judicial Code and probable jurisdiction noted. — U. S. —.

In addition to objections under New York law, appellants raised in their complaint and have consistently maintained that the statute impairs the obligation of contract within the meaning of Art. I, § 10, of the Constitution and deprives them of their property without due process of law under the Fourteenth Amendment. Their argument under the Contract Clause is that the statute transforms into a liquidated obligation an obligation which was previously only conditional. Their argument under the Due Process Clause is that New York has no power to sequester funds of these life insurance companies to meet the companies' obligations on insurance policies issued on New York residents for delivery in New York.

I. In support of their first contention appellants note that the policy terms provide that the insurer shall be under no obligation until proof of death or other contingency is submitted and the policy surrendered. They contend that in dispensing with these conditions the statute transforms an obligation which is merely conditional into one that is liquidated. They further claim that unless proof of death or other contingency is submitted, they will have difficulty in establishing other complete or partial defenses, such as the fact that the insured under-

[3] 187 Misc. 1004, 271 App. Div. 1002, 297 N. Y. 1.

stated his age in his application for insurance, that the insured died as a result of suicide, military service, or aviation, and that the insured was not living and in good health when the policy was delivered. We assume that appellants may find it more difficult to establish other defenses, but we do not regard the statute as unconstitutional because of these enforced variations from the policy provisions.

Unless the state is allowed to take possession of sums in the hands of the companies classified by § 700 as abandoned, the insurance companies would retain moneys contracted to be paid on condition and which normally they would have been required to pay. We think that the classification of abandoned property established by the statute describes property that may fairly be said to be abandoned property and subject to the care and custody of the state and ultimately to escheat. The fact that claimants against the companies would under the policies be required to comply with certain policy conditions does not affect our conclusion. The state may more properly be custodian and beneficiary of abandoned property than any person.

We think that the state has the same power to seize abandoned life insurance moneys as abandoned bank deposits, *Anderson National Bank* v. *Luckett*, 321 U. S. 233; *Security Bank* v. *California*, 263 U. S. 282, and abandoned deposits in a court registry, *United States* v. *Klein*, 303 U. S. 276. There are, of course, differences between the steps a depositor must take to withdraw a bank deposit and those that a beneficiary of a policy must take to collect his insurance. Each, however, must make appropriate representations according to the requirements of his contract with bank or insurance company. When the state undertakes the protection of abandoned claims, it would be beyond a reasonable requirement to compel the state to comply with conditions that may be quite

proper as between the contracting parties. The state is acting as a conservator, not as a party to a contract. Abandoned Property Law, Art. XIV, § 1404; State Finance Law, § 95; *Anderson National Bank* v. *Luckett, supra,* at 241.

We see no constitutional reason why a state may not proceed administratively, as here, to take over the care of abandoned property rather than adopt a plan through judicial process as in *Security Bank* v. *California, supra.* There is ample provision for notice to beneficiaries and for administrative and judicial hearing of their claims and payment of same.[4] There is no possible injury to any beneficiary. The right of appropriation by the state of abandoned property has existed for centuries in the common law. See *Anderson National Bank* v. *Luckett, supra,* at 240 and 251. We find no reason for invalidating the statutory plan under the Contract Clause.

II. Nor do we agree with appellants' argument that New York lacks constitutional power to take over unclaimed moneys due to its residents on policies, issued for delivery in the state, by life insurance corporations chartered outside the state. The appellants claim that only the state of incorporation could take these aban-

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[4] Abandoned Property Law, Art. XIV, § 1404:

"1. The care and custody, subject only to the duty of conversion prescribed in section fourteen hundred two of this chapter, of all abandoned property heretofore paid to the state, except

"(i) abandoned property in individual amounts of less than one dollar so paid pursuant to chapter one hundred seven of the laws of nineteen hundred forty-two; and of all abandoned property paid to the state comptroller pursuant to this chapter, is hereby assumed for the benefit of those entitled to receive the same, and the state shall hold itself responsible for the payment of all claims established thereto pursuant to law, less any lawful deductions, which cannot be paid from the abandoned property fund."

See also §§ 702, 1402, 1406 (1) (a) and (b), and *Anderson National Bank* v. *Luckett, supra,* at 242.

doned moneys. They say that only one state may take custody of a debt.[5] The statutory reference to "any moneys held or owing" does not refer to any specific assets of an insurance company, but simply to the obligation of the life insurance company to pay. The problem of what another state than New York may do is not before us. That question is not passed upon. To prevail appellee need only show, as he does as to policies on residents issued for delivery in New York, that there may be abandoned moneys, over which New York has power, in the hands of appellants. The question is whether the State of New York has sufficient contacts with the transactions here in question to justify the exertion of the power to seize abandoned moneys due to its residents. Appellants urge that the following considerations should be determinative in choosing the state of incorporation as the state for conservation of abandoned indebtedness, if such moneys are to be taken from the possession of the corporations. It is pointed out that the present residence of missing policyholders is unknown; that with our shifting population residence is a changeable factor; that as the insured chose a foreign corporation as his insurer, his choice should be respected; that moneys should escheat to the sovereignty that guards them at the time of abandonment. As a practical matter, it is urged that restricting escheat or conservancy to the state of incorporation avoids conflicts of jurisdiction between states as to the location of abandoned property and simplifies the corporations' reports by limiting them to one state with one law. Attention is called to presently enacted statutes in Pennsylvania,[6] New Jersey,[7] and Mas-

[5] Compare *State Tax Commission* v. *Aldrich*, 316 U. S. 174; *Northwest Airlines* v. *Minnesota*, 322 U. S. 292, 293, 494.

[6] Purdon's Penna. Stat., Title 27, §§ 434–437.

[7] N. J. Rev. Stat. § 17:34–49—34–58 (Cum. Supp., Laws of 1945–1947).

sachusetts.[8] None of these statutes apply to corporations chartered outside of the respective states. Furthermore, it is argued that the analogous bank deposit cases have upheld escheat or conservancy by the state of the bank's incorporation.[9] Finally reliance is placed on the undisputed fact that the policies are payable at the out-of-state main offices of the corporations, the evidences of their intangible assets are there located and there claims must be made and other transactions carried on.

These are reasons which have no doubt been weighed in legislative consideration. We are here dealing with a matter of constitutional power. Power to demand the care and custody of the moneys due these beneficiaries is claimed by New York, under Art. VII of the Abandoned Property Law as construed by its courts, only where the policies were issued for delivery in New York upon the lives of persons then resident in New York. We sustain the constitutional validity of the provisions as thus interpreted with these exceptions. We do not pass upon the validity in instances where insured persons, after delivery, cease to be residents of New York or where the beneficiary is not a resident of New York at maturity of the policy. As interests of other possible parties not represented here may be affected by our conclusions and as no specific instances of those types appear in the record, we reserve any conclusion as to New York's power in such situations. The appellants sought a declaration pursuant to New York procedure of the invalidity of Art. VII of the New York Abandoned Property Law, directed at unclaimed life insurance funds. The Court of Appeals refused to accept appellants' arguments for invalidation of the law on federal constitutional or any other grounds. This decision compelled the appellants

[8] Ch. 455, Mass. Acts and Resolves (1946).

[9] See *Anderson National Bank* v. *Luckett, supra; Security Bank* v. *California, supra; In re Rapoport's Estate*, 317 Mich. 291.

to comply with Art. VII, except as their defenses were saved by the opinion of the Court of Appeals, unless this Court reviewed the federal constitutional issues and decided them in appellants' favor. Consequently a case or controversy arising from a statute interpreted by the state court is here with precise federal constitutional questions as to policies issued for delivery in New York upon the lives of persons then resident therein where the insured continues to be a resident and the beneficiary is a resident at the maturity of the policy. A judgment on that class of policies should be reviewed by this Court. *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 259; *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405. See *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 459–63. We pass only upon New York's power to take over the care of abandoned moneys under those circumstances.

There have been, over the years, a close supervision and regulation by states of the business of insuring the lives of their citizens. There has been complete recognition of this relationship. See *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408.[10] New York has practiced such regulation.[11] Foreign corporations must obtain state authority to do business, segregate securities, submit to examination and state process. The business activities connected with the purchase of insurance by New York residents normally take place in New York. It is the beneficiary of the policy not the insurer who has abandoned the moneys. Undoubtedly the relationship is very close.[12] Certainly the relationship between New York

[10] An old provision makes New York law applicable to policies issued for delivery in New York. Insurance Law § 143 (2).

[11] New York Insurance Law, §§ 42, 59, 103, 143, 208 (5), 216 (6).

[12] See *Greenough* v. *Tax Assessors*, 331 U. S. 486; *Curry* v. *McCanless*, 307 U. S. 357. Compare *International Shoe Co.* v. *Washington*, 326 U. S. 310, 320: "It is evident that these operations establish

and foreign insurance companies as to policies here under discussion, is as close as that between the company and its state of incorporation.[13] The Court of Appeals on this point said:

> "For the core of the debtor obligations of the plaintiff companies was created through acts done in this State under the protection of its laws and the ties thereby established between the companies and the State were without more sufficient to validate the jurisdiction here asserted by the Legislature."

We agree with this statement and hold that New York had power to take over these abandoned moneys in the hands of appellants.

The judgment of the Court of Appeals of New York is affirmed except as to issues specifically reserved.

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sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there."

[13] See *New England Mutual Life Insurance Co.* v. *Woodworth*, 111 U. S. 138; *Ex parte Schollenberger*, 96 U. S. 369, 377; *Morgan* v. *Mutual Benefit Life Insurance Co.*, 189 N. Y. 447.

SUPREME COURT OF THE UNITED STATES

No. 337.—October Term, 1947.

The Connecticut Mutual Life Insurance Company, Massachusetts Mutual Life Insurance Company, National Life Insurance Company et al., Appellants,
v.
Frank C. Moore, Comptroller of the State of New York.

Appeal from the Court of Appeals of the State of New York.

[March 29, 1948.]

Mr. Justice Frankfurter, dissenting.

My brother Jackson's opinion, with which I substantially agree, persuades me that we should decline to exercise jurisdiction in this case. The wise practice governing constitutional adjudication requires it. For this proceeding poses merely hypothetical questions, all of which are intertwined and concern interests not represented before us. Circumstances not more compelling, surely, than this record discloses led us in a series of recent cases to avoid borrowing trouble by declining to adjudicate premature constitutional issues. *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450; *United Public Workers of America* v. *Mitchell*, 330 U. S. 75; *Rescue Army* v. *Municipal Court*, 331 U. S. 549.

In appearance this is a suit between a few insurance companies and the State of New York. But at the heart of the controversy are the conflicting claims of several States in a hotchpot of undifferentiated obligations. The proceeds of "abandoned" life insurance policies cannot, I assume, be seized as for escheat more than once. Since the rights and liabilities growing out of such policies are, to a vast extent, the result of a process that concerns two

or more States, their interests may come into conflict when, in exigent search for revenue, they invoke the opportunities of escheat against unclaimed proceeds from insurance policies. I assume merely conflicting State interests and lay aside considerations that may be drawn from the decision in *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533.

In the vigilant search for new sources of revenue, several States have already sought to tap for their own exchequers the matured obligations of unclaimed policies. It would be impractical not to assume that other States will do likewise. Only New York's claim is before us. It is vital to define the precise nature of this claim. New York does not lay claim to a particular fund constituting the proceeds of abandoned matured obligations. This litigation, it is conceded, seeks to test abstractly the constitutionality of the New York statute providing for turning over to her the avails of abandoned matured insurance policies. New York asks that her right to the hotchpot of undifferentiated obligations be acknowledged. Of course New York may enable its courts to pass on the validity of a comprehensive statute unrelated to the enforcement of specific claims to specific funds that came into existence under circumstances differing in their constitutional significance. It does not follow, however, that what the New York Court of Appeals has adjudicated we must review.

The New York Court of Appeals sustained the power of New York to claim escheat on abandoned insurance maturities from foreign insurance companies doing business in New York on the basis of the insured's residence in New York at the time of the delivery of the policy in New York. According to this view, as MR. JUSTICE JACKSON points out, change of residence of the insured or of the beneficiary long before maturity of the policy, or nonresidence in New York of a beneficiary, other than the

insured, at any time, become utterly immaterial. These are only some of the familiar situations that are encompassed by the Court of Appeals validation of the New York statute.

This Court does not purport to affirm all that is included in the New York judgment. It is fair, however, to say that the Court's opinion does not enumerate what possible situations included in the judgment below it has not passed upon. It is explicit in putting to one side the validity of the New York statute in "instances where insured persons, after delivery, cease to be residents of New York or where the beneficiary is not a resident of New York at maturity of the policy. As interests of other possible parties not represented here may be affected by our conclusions and as no specific instances of those types appear in the record, we reserve any conclusion as to New York's power in such a situation." But "no specific instances" of any type appear in the record. Indeed, it may be said that the only instances of types of transactions as to which escheat is claimed that are in the record are the types on which the opinion of the Court declines to pass. The complaint specifically refers to the frequency with which policies are issued upon the lives of New York residents for non-New York beneficiaries, as well as the extent with which holders of policies change their residence. On the state of the pleadings, these allegations must be accepted as true. To be sure, New York lays claim to all funds reflecting these situations, and its highest court has sustained this generalized claim. But, as already indicated, this is not a suit for any specific fund. For all we know there are no funds in New York to which that State could lay claim even within the circumscribed affirmance by this Court of the New York judgment.

Whatever the scope of the Court's decision, it is a hypothetical decision. New York has been sustained be-

low in an abstract assertion of authority against funds not claimed nor defined, except compendiously defined as the right to go against insurance companies doing business in New York for the proceeds of policies delivered in New York upon the lives of insured then resident in New York. This generalized decision the Court rejects. Instead, it carves out different and limited claims for which New York may go without any indication that there is anything on which such claims could feed. In any event, such a mutilated affirmance of the decision of the New York Court of Appeals, with everything else left open, is bound to hatch a brood of future litigation. Claims of the States of domicile of the insuring companies, claims of the States of residence of the insured at the time of maturity, claims of the States of residence of beneficiaries other than the insured at the time of maturity, are all put to one side here as not presented by the record though they are as much presented as what is decided. To revenue-eager States these are practical situations full of potentialities. This Court is all too familiar with the special position of control claimed by a chartering State and the special powers the domiciliary State of a deceased asserts over his "intangibles."

How the conflicting interests of the States should be adjusted calls for proper presentation by the various States of their different claims. Words may seek to restrict a decision purporting to pass on a small fragment of what is in truth an organic complexity to that isolated part. But such an effort to circumscribe what has been decided is self-defeating. A decision has a momentum of its own, and it is nothing new that legal doctrines have the faculty of self-generating extension. We ought not to decide any of these interrelated issues until they are duly pressed here by the affected States, so that a mature judgment upon this interrelation may be reached. All the considerations of preventive adjudi-

cation—the avoidance of a truncated decision of indeterminate scope, with the inevitable duty of reconsidering it or unconsciously being influenced by implicit overtones of such a decision—require that decision await the ripening process of a defined contest over particular funds as to which different States make concrete claims.

The way is open to secure a determination by this Court of the rights of the different States in the variant situations presented by abandoned obligations on matured insurance policies. It is precisely for the settlement of such controversies among the several States that the Constitution conferred original jurisdiction upon this Court. If Florida, Massachusetts, New York and Texas could bring here for determination their right to levy a death tax in respect to a particular succession, *Texas* v. *Florida*, 306 U. S. 398, even more fitting is it that the claims of various States to seize the matured obligations of abandoned insurance policies should be presented by those States at the bar of this Court and be adjudicated here after full reflection on all these claims. Of course the insurance companies have interests to protect and to present. But the essential problem is the legal adjustment of the conflicting interests of different States, because each may have some relation to transactions which give rise to funds that undoubtedly are subject to escheat. Until that is duly before us we should not peck at the problem in an abstract, hypothetical way.

The appeal should be dismissed.

SUPREME COURT OF THE UNITED STATES

No. 337.—October Term, 1947.

The Connecticut Mutual Life Insurance Company, Massachusetts Mutual Life Insurance Company, National Life Insurance Company et al., Appellants, v. Frank C. Moore, Comptroller of the State of New York.	Appeal from the Court of Appeals of the State of New York.

[March 29, 1948.]

Mr. Justice Jackson, with whom Mr. Justice Douglas joins, dissenting.

I find myself unable to join the Court in this case. I cannot agree that we may affirm the judgment below without facing, or by reserving our opinion upon, the constitutional question inherent in this statute by which New York would escheat unclaimed insurance proceeds not located either actually or constructively in New York and which are the property of a beneficiary who may never have been a resident or citizen of New York.

This action is one for a declaratory judgment as to the validity of the Act and we are therefore passing on the Act as an entirety and in the abstract. The cases of non-resident beneficiaries are before us as much as any other concrete case. The Act purports to escheat in every case in which the policy was issued for delivery in New York and the insured was then a resident of that state. The unchallenged complaint alleges the Comptroller's instructions to be that removal of the insured from the state after issuance of the policy does not take a case out of

the Act. The statute, as written and as affirmed, obviously intends to reach nonresident claimants and insured persons, for it provides for binding them by publication (§ 702 (2)), and by publication within New York at that. Moreover, and most importantly, in reaching the judgments which we affirm, the opinion of the Special Term of Supreme Court, while holding some features of the Act invalid, expressly considered and upheld these provisions of the Act and the Court of Appeals indicated no disagreement. Our affirmance necessarily sustains the whole judgment below and that sustains the Act in these particulars. It is perhaps unfortunate to adjudicate constitutionality in such a manner. If we had before us a concrete case, contested by adversary state claimants to the right of escheat and based on a record that would show some facts as to residence of parties to the transactions, we would know better what we are talking about. But since in a declaratory judgment action we can have only hypothetical cases before us, I cannot ignore one which certainly occurs frequently and one embraced within both the Act and the decision below.

Neither the Act nor the decision below contemplates that the right to escheat is based on residence of the owner of the proceeds at the time of escheat, or at any other time, but rather on these two facts: (1) that the policy was issued for delivery in New York, and (2) that the *insured* was then a resident of New York. Thus, the State claims power to escheat what is due a *beneficiary* solely because it was the residence of the *insured* when the policy was issued and irrespective of the nonresidence at that time and at all times of the beneficiary whose property it takes. Thus, the escheat of one man's property is based on another man's one-time residence in the state. Further, the seizure of today is based not even on the assured's residence at the time the policy matured, but on his residence at some prior date, which,

in view of the long-term nature of insurance contracts, may have been many years ago.

The effect of the Court's affirmance of the judgment upholding this statute is that a residence by the insured in New York at the time a policy was "issued for delivery", there shows "sufficient contacts with the transaction," so that the State may escheat proceeds owned by a beneficiary who may never have lived in that State. Even in the abstract, I find the concept of "sufficient contacts with the transaction" too vague to be helpful in defining practical bounds of a state's jurisdiction or power to escheat. We are given no enlightenment as to why any one or more events is regarded as "sufficient," nor as to what jurisprudential context is to be given to the term "contact," which seems taken over from some vernacular other than that of the law. I cannot even tell here what the Court thinks the controlling "transaction" is. If it is issuance of the policy that is the "contacted" transaction, it would seem that the State where it was issued, where premiums were paid, or where it was actually delivered, would be more controlling than the place where it was "issued for delivery." If it is the maturing of the claim, I see less "contact" from a sometime and remote residence than from a later one, or one at the time of events which matured the policy.

The weakness of the Court's test of sufficient contacts with the "transaction" is more fully revealed when we consider that by its application today other states are cut off from escheating the proceeds (unless the company is subject to multiple escheats), although by the same tests they have many more and much closer "contacts" with some part of the transaction. If we say New York may step into the beneficiary's shoes and collect his unclaimed insurance proceeds solely because the insured lived in New York when the policy issued for delivery there, how can we deny the claim of another state to escheat the same

fund when its claim is asserted under any one or more of the following circumstances: (1) It is the state in which the insured has died or where some other contingency occurred which brought the claim to maturity. (2) It is the state in which the beneficiary always has resided and was last known to reside. (3) It is the state of a proved later and longer residence of the insured. (4) It is the state to which both the insured and the beneficiary removed and resided after the policy was taken out in New York. (5) It is the state of actual permanent domicile, as opposed to mere residence in New York, of the insured and the beneficiary. (6) It is the state of actual delivery of the policy, though it was "issued for delivery" in New York. (7) It is the state where the claim is payable and where funds for its discharge are and at all times have been located. Certainly the foregoing are "contacts" as I would understand the term, and some of them or some combination of them seem more persuasive of a right to escheat than the grounds on which we are affirming New York's right to do so.

I am not unmindful of the Court's pronouncement that it does not decide what a state other than New York may do and that it excepts from its approval "instances where insured persons, after delivery, cease to be residents of New York, or where the beneficiary is not a resident of New York at maturity of the policy." As to those cases, the Court says it reserves any conclusion. But how can it reserve a conclusion as to whether "contacts" here determined to be sufficient in the case of New York will be sufficient in the case of another state? The issue of "sufficiency of contacts" is settled by this decision. The premises that are being applied today lead inescapably to the conclusion that other states have equally good grounds (*i. e.*, "sufficient contacts") to escheat the same claims. Are we going to repudiate our reasoning in this case the first time another state invokes

it in conflict with New York, or will we hold the reasoning impeccable and, hence, the company subject to a double or multiple liability to escheat? The effort to remain uncommitted to any conclusion is self-delusive when it is accompanied, as it is here, by a commitment as to all of the factors which shape the conclusion "reserved."

It seems to me that the constitutional doctrine we are applying here, if we are consistent in its application, leaves us in this dilemma: In sustaining the broad claims of New York, we either cut off similar and perhaps better rights of escheat by other states or we render insurance companies liable to two or more payments of their single liability. If we impale ourselves, and the state and insurance companies along with us, on either horn of this dilemma, I think the fault is in ourselves, not in our Constitution.

For the juridical basis on which escheat has from time to time rested, we need go no farther than the law of New York itself as expounded by Judge Cardozo. Escheat survives only as an "incident of sovereignty," whether the subject of escheat is personal or real estate. *Matter of People* (*Melrose Ave.*), 234 N. Y. 48. But sovereignty by itself means nothing; sovereignty exists in respect of something or over someone. The two usual examples of escheat properly incidents of sovereignty are:

First, sovereignty in the sense of actual dominion over the property escheated. The State on this basis may, of course, take unto itself lands which fail of private owners through want of heirs, and tangible personal property lost or abandoned in the state. The right to appropriate intangible property constructively within the state also has been upheld by this Court on grounds that "the deposits are debtor obligations of the bank, incurred and to be performed in the state where the bank is located, and hence are subject to the state's dominion." *Anderson National Bank* v. *Luckett*, 321 U. S. 233; *Security Bank* v.

California, 263 U. S. 282. See also *United States* v. *Klein*, 303 U. S. 276. But New York can show neither actual nor constructive dominion over the property sought now to be escheated. The proceeds to be escheated are held by out-of-the-state insurance companies and by no stretch of imagination are they within New York's dominion. And certainly residence of the insured at the time the policy issued cannot generate constructive possession of either the beneficiary's claim or the actual proceeds at maturity or at the time of abandonment.

Second, sovereignty over the person, as a resident or citizen, will justify the state in stepping into his shoes as claimant of abandoned property. Our federal form of government presupposes a dual allegiance. In addition to a general allegiance to the United States, each person has a particular allegiance to the state of which he is a resident, and hence, under the Fourteenth Amendment, is a citizen. This status, while it lasts, subjects him and what is his to state power. But New York, under this statute, does not rely on this relationship to sustain this escheat. It would step into the shoes of beneficiaries last known to be citizens of other states and even if they were so unfortunate as never to have been in New York State. The State bases its right to seize such a non-resident's assets solely on the fact that the insured was there when the policy issued. But even if the allegiance of the insured would in some circumstances justify escheat of the beneficiaries' payments, how can it do so after the allegiance has long since ceased? The right of a citizen to migrate from one state of the Union to another, *cf. Edwards* v. *California*, 314 U. S. 160, carries with it, of necessity, the right of expatriation, a right for which this Nation has always contended. A state cannot fasten its power and will upon a resident so that it adheres to him for life. I have never before heard it denied that one, if he makes his intent sufficiently clear, may by migration

bring to an end his allegiance to a state and with it the state's sovereignty over him. But New York's plan requires us to say not only that sovereignty over an insured reaches the property of a third-party beneficiary but that such a consequence follows both parties for life, although the insured may have deliberately acquired a new allegiance and become a citizen of another state, and the beneficiary may never have been in New York.

Consideration of these conventional and established grounds of escheat shows not only that they fail to support the New York statute in this class of cases, but also that they establish a superior right of escheat in other states as an incident of their sovereignty. Of course, the two grounds I have mentioned may bring two states into conflict. Indeed, such a conflict now exists. Pennsylvania, apparently relying on the theory of the bank deposit cases, undertakes to escheat all unclaimed funds in the hands of companies it has chartered, even though the insured may have been a resident of New York when the policy issued, so that New York would claim the same fund. Can we now say New York may take, without saying Pennsylvania must give? Do we say the company must pay twice? This makes pertinent the question whether we should not decline to decide such issues as are here involved when they are presented only in the abstract by a declaratory judgment action. See *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461.

But if we are to entertain the case, I think we should decide it, not by extemporized generalities like "sufficient contacts with the transaction," but by recognized standards having definite connotations in the law. New York is not the only state with an interest in these questions. New York is merely the sole state whose argument we have heard. The mobility of our population and the complexity of our life create many confusions in which

the states may properly look to us for some standard by which they may know what and whom to claim for their own. It seems to me that we should not unnecessarily confound what at best is confusion, by removing the landmarks of state jurisdiction erected by years of trial and error. *Cf.* dissenting or concurring opinion in *Duckworth* v. *Arkansas*, 314 U. S. 390; *State Tax Commission* v. *Aldrich*, 316 U. S. 174; *Williams* v. *North Carolina*, 317 U. S. 287; *General Trading Company* v. *State Tax Commission*, 322 U. S. 335; *International Harvester Co.* v. *Wisconsin*, 322 U. S. 435; *Northwest Air Lines* v. *Minnesota*, 322 U. S. 292; *Greenough* v. *Tax Assessors*, 331 U. S. 486; *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. —; and others, probably yet to come.

While we may evade it for a time, the competition and conflict between states for "escheats" will force us to some lawyerlike definition of state power over this subject. It is naïve beyond even requirements of the judicial office to assume that this lately manifest concern of the states over abandoned insurance proceeds reflects only solicitude for the unknown claimants. If it did the states' claims might reconcile more easily. But escheat of these interests is a newly exploited, if not newly discovered, source of state revenue. Escheat, of course, is not to be denied on constitutional grounds merely because the motive of the states savors more of the publican than of the guardian. But it is relevant to the caution and precision we should use in sustaining one state's claim, least we be foreclosing other better founded ones.

This competition and conflict between states already require us, in all fairness to them, to define the basis on which a state may escheat. The first Act of this kind was by Pennsylvania in 1937. Act of June 25, 1937, Pamphlet Laws 2063, Purdon's Pa. Stat., Title 27, § 434. It is also alleged, and not denied, that two other states have enacted similar laws which are now in force. The

Pennsylvania statute "escheats," as the Court says, only proceeds of policies issued by companies incorporated in Pennsylvania. But it escheats all of those regardless of residence of the insured or of where the policy was delivered. Its conflict with the law before us is patent and immediate. We cannot sustain New York's statute without, to the extent here indicated, striking down that of Pennsylvania, which is not a party here and whose claims have not been heard. The original New York statute, ch. 923, Laws of 1939, was similar to the Pennsylvania Act. It was attacked as unconstitutional, *New York Life* v. *Pink*, New York Law Journal, Dec. 21, 1939, p. 2257, but was amended to apply only to policies issued by New York companies on the lives of residents of New York. Ch. 602, Laws of 1940. In 1943 these Acts were removed from the Insurance Law, re-enacted as part of the Abandoned Property Law. Ch. 697, Laws of 1943. In 1944 these present statutes were enacted, extending to foreign insurance companies and on the basis here in question. Chs. 497, 498, Laws of 1944. Thus, it represents a deliberate state plan of escheat based only on issuance, for delivery in New York, of a policy insuring the life of a then New York resident, and irrespective of location of the insurer or residence of the beneficiary.

For the reasons outlined herein, I should express disapproval of the declaratory judgment below, decline to certify the validity of this legislation at this time and deal with this problem only as presented by concrete cases or controversies involving particular funds and facts. But if we are to render a decision in the abstract, I should say that New York by this statute overreaches its sister states by the tests I have set forth.